Supreme Court, U.S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

KENNETH S. BENIGNI,

PETITIONER,

VS.

DONALD W. MAAS, JOHN F. KIRCHBERG, DENNIS MUNSON, AND P.M. EPPELE,

RESPONDENTS,

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KENNETH S. BENIGNI
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7485 Kauppi Lake Road
Cotton, Minnesota 55724
Tel: (None)

163 pp

QUESTIONS PRESENTED

1. Can a governmental agency, in this case the United States Department of Agriculture, deny an applicant the specific license he needed and applied for, return his submitted license fees; then issue him an unrequired, unwanted, unapplied for, unpaid for, and rejected license; for which he was not even legally eligible, qualified, or required to have under the Animal Welfare Act; and then subject him to the sanctions of that legally impossible to exist license, especially under the due process clause of Amendment Five of the United States Constitution?

2. Even if the person were licensed, in this case under the AWA, in the absence of exigent circumstances, can government agents, without warrant or consent, during the absence of the owner/licensee and all of his representatives, if any, and without his

or their knowledge, conduct administrative inspections/searches of his premises, i.e. in secret, under Amendment Four of the United States Constitution? (in this case, also in violation of their agency's own rules and regulations, and beyond the scope and authority of the AWA, and on four separate occasions)

3. Inasmuch as under the provisions of 9 CFR Ch. 1 Section 2.5 (a)(2), the licensee could voluntarily terminate his license at the onset of the administrative search and thus prevent its occurrence, were he present to do so, does his absence, precluding his opportunity to voluntarily terminate his license to prevent the search deny him his right to due process under the Fifth Amendment of the United States Constitution?

4. Does the mere licensing of a person under the Animal Welfare Act, subject all of

that person's property, including areas devoid of any animals and having no relationship whatsoever to the AWA, to searches by USDA agents; or are the searches limited in scope to animals and facilities specifically covered by the authority of the Act under Amendment Four of the United States Constitution?

5. When the evidence shows that the government agents, without warrant or consent, searched a person's premises for four days, while neither he nor anyone else was present or had any knowledge of the searches; falsified official documents in violation of criminal statute (Title 18 U.S.C. Section 1001.), fabricated evidence, urinated near that person's water well, and took affirmative steps to maliciously prosecute that person based on the material falsified documents, proven incontrovertibly to be false, and were motivated in large

part by a desire and intent to retaliate against Petitioner for his exercise of his freedom of speech to criticize illegal, dangerous, or improper acts of government agents, has (A) the United Attorney abused his authority or discretion by certifying that the agents' acts were within the scope of their employment? (B) have the courts below abused their discretion by accepting the United States Attorney's certification that the agents were acting within the scope of their employment?

LIST OF ALL PARTIES TO THIS PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

I certify that the following comprise all interested parties known to Petitioner:

Kenneth S. Benigni - Petitioner

Donald W. Maas,
John F. Kirchberg,
Dennis Munson,
P. M. Eppele - Respondents.

United States of America.

Kenneth S. Benigni
Petitioner, pro se

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

Kenneth S. Benigni,

Petitioner,

vs.

Donald W. Maas, John G. Kirchberg, Dennis Munson, and P.M. Eppele,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Kenneth S. Benigni, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eight Circuit entered in the above-entitled case on December 8, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eight Circuit is unreported. (Appendix at page 2a) The Judgment of the United States District Court, District of Minnesota, Third Division, unreported, appears in the Appendix, at page 14a. The Report and Recommendation of the Magistrate, adopted by the United States District Court, District of Minnesota, Third Division, unreported, appears in the Appendix at page 17a. The Order of the United States District Court, District of Minnesota, Third Division denying motion to vacate or amend the Court's Order of February 22, 1993 appears in the Appendix at page 66a. The Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc of the United States Court of Appeals for the Eighth Circuit Appears in the Appendix at

page 68a.

JURISDICTION

The Opinion of the United States Court of Appeals for the Eighth Circuit (Appendix at page 2a) was filed on December 8, 1993. A timely Petition for Rehearing was filed on December 21, 1993. The Court of Appeals' denial of the Petition for Rehearing and Suggestion for Rehearing En Banc was issued on January 21, 1994 and appears in the Appendix at page 68a. This Court's jurisdiction is invoked under Title 28, U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

AMENDMENT I TO THE UNITED STATES CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT IV TO THE UNITED STATES CONSTITUTION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or

public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Public Law 94-279 (S. 1941); April 22, 1976, Section 3. (f), or Title 7 U.S.C. Section 2132 Definitions:

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of,(1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that

this term does not include —

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year;

9 CFR Ch. 1 Section 1.1 Definitions (1-1-86 Edition:

(t) "Dealer" means any person who, in commerce, for compensation or profit, delivers, for transportation, or buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive of(sic) dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include:

(ii) Any person who does not sell or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more

than $500 gross income from the sale of other animals during any calendar year.

(w) "Exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation....

9 CFR Ch. 1 Section 2.1 Application (1-1-86 Edition

(a) Any person operating or desiring to operate as a dealer, exhibitor, or operator of an auction sale (where any dogs or cats are sold affecting commerce), except persons who are exempted from the licensing requirements under section 3 of the Act, shall apply for a license on a form which will be furnished, upon request, by the Veterinarian in Charge of the State in which such person operates or intends to operate.

If such person operates in more than one State, he shall apply to the State in which he has his principal place of business. The completed application form shall be filed with such Veterinarian in Charge.

(b) Any person who is not a dealer or exhibitor, but who desires to obtain a license, shall follow the requirements for dealers and exhibitors set forth in paragraph (a) of this section and in sections 2.2 and 2.3, and shall agree in writing, on a form furnished by Veterinary Services, to comply with all the requirements of the Act and the provisions of this subchapter. A license will be issued to any such applicant when the requirements of section 2.2 and 2.3 have been met, and when the applicant has submitted to the Veterinarian in Charge a fee of $5 by certified check, cashier's check, personal

check, or money order. In addition to the fee required to be paid upon application for a license,such licensee shall submit to the Veterinarian in Charge a fee of $5, by certified check, cashier's check, personal check, or money order, on or before each anniversary date of his license. The failure of any such person to comply with any provision of the Act, or any of the provisions of the regulations or standards of this subchapter, shall constitute grounds for automatic termination of such license or for its suspension or revocation by the Secretary.

9 CFR Ch. 1 Section 2.2 Acknowledgement of standards. (1-1-86 Edition)

A copy of the applicable standards will be supplied to the applicant with each request for an application for license, and the applicant shall acknowledge receipt of such

standards and agree to comply with them by signing the application form provided for such purpose by Veterinary Services.

9 CFR Ch. 1 Section 2.5 Duration of license. (1-1-85 Edition)

(a) A license issued under this part shall be valid and effective unless:

(1) Said license has been revoked or suspended pursuant to section 19 of the Act.

(2) Said license is voluntarily terminated upon the request of the licensee in writing to the Veterinarian in Charge.

(b) Failure by a licensee to pay the annual license fee as required by sections 2.1 and 2.6 or to file the annual report as required by section 2.7 on or before the anniversary date of his license shall result in automatic termination of the license: Provided, however, that prior to such termination the licensee shall be given notice and opportunity to comply with the

annual license fee and reporting requirements. Failure to comply with the annual license fee and reporting requirements within 60 days from receipt of such notice shall result in automatic termination of license.

(c) A license which is invalid under paragraph (a) of this section shall be surrendered to the Veterinarian in Charge in the State where the license was issued.

9 CFR Ch. 1 Section 2.126 Access and inspection of records and property. (1-1-86 Edition)

Each dealer, exhibitor, operator of an auction sale, or research facility, shall, during ordinary business hours, permit Veterinary Services representatives, or other Federal officers or employees designated by the Secretary, to enter his place of business to examine records required to be kept by the Act and the

regulations in this part, and to make copies of such reports, and permit Veterinary Services representatives to enter his place of business, to inspect such facilities, property and animals as such representatives consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter....

9 CFR Ch. 1 Section 2.128 Inspection for missing animals. (1-1-86 Edition)

(a) Each dealer, exhibitor, operator of an auction sale and research facility shall, upon request, during ordinary business hours, permit, under the following conditions, police or law officers of legally constituted law enforcement agencies with general law enforcement authority (not those agencies whose duties are limited to enforcement of local animal regulations) to enter the place of business of such dealer, exhibitor, operator of an auction sale or

research facility to inspect animals and records for the purpose of seeking animals that are missing:

(2) The police or law officer shall abide by all security measures required by the dealer, exhibitor, operator of an auction sale or research facility to prevent the spread of disease, including the use of sterile clothing, footwear, and masks where required, or to prevent the escape of an animal.

PUBLIC LAW 91-579; 84 STAT. 1560 (ANIMAL WELFARE ACT OF 1970)

"Sec. 16 (a) The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, research facility, or operator of an auction sale subject to section 12 of this Act, has violated or is violating any provision of this Act or any regulation or standard issued thereunder, and for such

purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 10 of any dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale....

Title 7 U.S.C. Section 2146. Administration and enforcement by Secretary. (a) Investigations and inspections. (same as P.L. 91-579 above except that last two lines read: "section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale.) (in effect in 1986)

7 CFR Subtitle A (1-1-92 Edition) Subpart B — Conduct and Responsibilities of Employees

Section 0.735-11 Prohibited conduct — general. (as amended 4/20/81)

(a) An employee shall avoid any action, whether or not specific-prohibited by this subpart, which might result or create the appearance of:

(2) Giving preferential treatment to any person;

(3) Impeding Government efficiency or economy;

(5) Making a Government decision outside of official channels; or

(6) Affecting adversely the confidence of the public in the integrity of the Government.

(b) Employees are specifically prohibited from:

(1) Engaging in criminal, infamous, dishonest or notoriously disgraceful conduct, or other conduct prejudicial to the Government.

Title 18 U.S.C. Section 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 18 U.S.C. Section 1623, False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United states Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false

material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 28 U.S.C. Section 2679, Exclusiveness of remedy (FTCA), (b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office of employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim

or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee of the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government —

(A) which is brought for a violation of the Constitution of the United States, or....

Title 5 U.S.C. Section 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power of authority.

(b) A sanction may not be imposed or substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is make for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given —

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has make timely and sufficient application for renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

STATEMENT OF THE CASE

From about 1965 through 1984, Petitioner was involved in the raising of fur bearing animals. About 1973, he began to raise "alterative type" pet animals; descented skunks, ferrets, raccoons, and wolves, etc. for the pet trade. This activity required a USDA "dealer" license under the Animal Welfare Act. Petitioner held a USDA Class A dealer license issued to him by the United States Department of Agriculture, Animal and Plant Health Inspection Service, Veterinarian Services

(USDA) from June 26, 1974 until June 25, 1979. From June 26, 1979 until June 25, 1985, Petitioner held a Class B dealer license, which is required if the licensee buys animals for resale to pet shops, in addition to those animals which he raised for himself. (essentially wholesale) Petitioner stopped selling any animals for pets in 1984 and was converting his operation to that of roadside zoo for which he was required to have a Class C "exhibitor" license. His 1985 application for renewal of his Class B license with request it be changed to a Class C license, brought the reply: "Your application and fee for continuation of your "B" dealers license #41-B-100 from 6/26/85 through 6/25/86 has been received.", whereas all previous replies to Petitioner's applications stated unequivocally: "Your application for a "B" dealer's license under

the Animal Welfare Act has been approved.", or essentially the same, but always including the words "has been approved". The 1985 application was never "approved", either in writing or orally. On August 13, 1985, Respondent Donald W. Maas did inspect Petitioner's zoo facilities for Class C licensing purposes. During that inspection Maas falsified the inspection report by listing fictional violations which were physically impossible to have been observed from any point he had access to. The Class B license was never approved, denied, or changed to a Class C license as requested. In 1986, to avoid the ambiguity and avoidance of specific requests for the class of license change, Petitioner specifically applied for a Class C (exhibitor) license which was the only license which would meet the legal requirements for his un-opened zoo. Moreover, his St. Louis Co., Minnesota

Land Permit required: "that all applicable State and Federal regulations be adhered to." (obtained 9/17/84). Petitioner had already acquired a zoo license from the State of Minnesota in June of 1986. The USDA Class C license was the last license needed to open his zoo. Instead of proceeding on Petitioner's application for a Class C license, the USDA instead renewed his never approved 1985 Class B license which was not legal or of any value for Petitioner's purposes. Petitioner rejected the Class B license by letter on August 18, 1986. On August 20, Respondents Maas, John F. Kirchberg (Kirchberg, and another USDA employee, W. Scott Manning (Manning), clutching Petitioner's letter openly in their hands, arrived unannounced and inspected Petitioner's zoo facilities for Class C licensing purposes. The inspection was strictly limited to the zoo area, as

established by Petitioner's land use permit, and no one entered any of the 14 buildings on the premises which were not being used for any purpose covered by the AWA and were physically separate from the zoo area. After the inspection, all three agents told Petitioner that his zoo facilities did not meet the requirements of the AWA and that he could not be licensed as an exhibitor and that a Class C license would not be granted to him and his $10 license fee was returned to him. All three agents told Petitioner that he must send the USDA $5 for the Class B license (which he had not applied for, and could not legally have or use). They also told Petitioner that since he was not selling any animals whatsoever, he was not required to have a USDA license of any sort. Their statements are confirmed in three affidavits make under oath upon their return to Minneapolis/St. Paul. The inspection

report was signed by Maas and Manning, given to Petitioner who signed it, taken back by Maas when the subject of skunks came up and Manning or Kirchberg realized that none of the agents had been in the skunk shed, who then inserted Petitioner's copy back under the carbon copy portion of the original report, continued to write on the report for a couple of minutes, handed Petitioner's copy back to him and the agents then promptly left. After putting his reading glasses on shortly thereafter, Petitioner saw that Maas had listed violations in the skunk shed where the agents had never been or even close to. In addition, the same violations, impossible to observe because chain link security fences and locked gates precluded any possibility of visual observance of the subject area regardless of what the conclusion would be, were again included. Petitioner was outraged by these

lies and vowed to have nothing whatsoever to do with any USDA licenses and in fact began to again explore the possibilities of operating his zoo free and not be required to be licensed by the USDA. Respondent Eppele sent Petitioner a letter dated August 26, 1986 which officially denied his application for the Class C license while still attempting to saddle him with the unapplied for Class B license. Petitioner willfully and by design never sent the USDA the $5 Class B license fee because he never applied for it and could not use it.

Under the provisions of 9 CFR Section 2.5 (b), a license is automatically terminated for non-payment of the renewal fee; provided that (during 1986) the licensee is given notice to comply with the fee payment, and is given 60 days in which to do so. Under the broadest scenario, Petitioner was given notice to pay the $5

fee on August 20, 1986 (confirmed in their three affidavits). Thus, the unapplied for and unpaid for Class B license, if it even ever existed, automatically terminated on October 19, 1986.

On December 3, 1986, Respondents Maas, Kirchberg, and Dennis Munson (Munson); on December 4, 1986, Maas and Krichberg; and on December 5 and 10, Maas alone; conducted warrantless, consentless searches of Petitioner's premises while neither he nor any agent of his was present on the premises, or had any knowledge of the searches. Since Petitioner was not present, he was denied the right and opportunity to voluntarily terminate his license under the provisions of 9 CFR Section 2.5 (a)(2), if such license even ever existed. The agents conduct is explicitly prohibited by USDA rules, regulations and policies. During the search of December 10, 1986, Maas urinated

in very close proximity to Petitioner's water well and only source of drinking water on the premises. The inspection reports resulting from these searches were replete with fabricated and false statements which are proven to be false by the agents' own photographs which show that the serious and material critical misrepresentations made in the inspection reports were, again, impossible to have been observed or otherwise verified, or were non-existent. During the searches, the three agents entered every building or other area on the premises unless foiled by locked security gates or locked doors. These buildings involved no activity covered by the AWA and were beyond the scope and authority of the AWA. Maas made sketches of a sign Petitioner had legally erected on his land near the highway strongly urging the sheriff to enforce the drunk and reckless driving

laws in the area, and sketches of Petitioner's no trespassing signs; which had nothing to do with the AWA, but everything to do retaliation against him for exercising his right of freedom of speech, and included those sketches with his inspection reports.

On December 16, Respondent P. M. Eppele (Eppele), the Veterinarian in Charge, and superior of the other Respondents, sent a letter to "All USDA Registrants and Licensees", stating that the USDA had to eliminate unproductive time spent on unsuccessful inspection attempts and advising them that in the future "After reasonable accommodation and documented notice of warning, an alleged violation will be prepared for failure to allow inspection by any licensee whose facility is not accessible for unannounced inspections during ordinary business hours..." The existence of this letter strongly implies

that: (a) other USDA agents were not conducting inspections or searches when the licensee was absent from his premises; (b) they knew such conduct was prohibited by Amendment Four; (c) Eppele was not going to tolerate unsuccessful inspections.

On about February 1, 1987, Petitioner first learned of the searches from the animal caretaker, Stanley Miller, when Petitioner called him from Ohio. Miller told Petitioner about the urination near the well at that time, and has signed a notarized statement to that effect since then. On February 3, 1986, Petitioner sent Eppele a letter of outrage concerning the illegal searches and the falsified documents of August 13, 1985 and August 20, 1986. Petitioner clearly stated in that letter: "It should have been crystal clear to you that I had severed all connections with your agency when I did not send you the five

dollars license fee after you returned my overpayment money order of ten dollars which you had held for months instead of depositing it as a reputable federal agency would have done. Since you did not have enough sense to realize that, this then is a formal notification: I have severed any and all association with your disgraceful agency. U.S.D.A.-A.P.H.I.S.-V.S. Void my license immediately." The letter, inarticulate as it is, since Petitioner was in a fighting mood, and not a writing mood, nevertheless shows that Petitioner never had any intention to accept the unapplied for Class B license and allowed it to lapse/automatically terminate, as it by law did on October 26, 1986 at the latest, if it ever even existed. The "Void my license immediately" statement was made out of exasperation at their refusal to admit that they no longer had any authority over

Petitioner or his farm and persisted to pretend that Petitioner had a license. Petitioner at this time was not even aware that not one, but four searches had occurred, or of the scope of those searches, or that Respondent had maliciously initiated an effort to fine him $5,000 which was based on their fabricated evidence and falsified documents. This was only learned by Petitioner when he was served with Respondents' brief for their motion to dismiss on about August 23, 1992 or a few days thereafter. On February 10, 1987, one day after receiving Petitioner's letter of outrage complaining, inter alia, about Maas urinating near his well, Kirchberg sent Eppele a report identified as Case No. MN-AW-87-11, in which, besides the previously referred to false statements, he added: "His file contains many abusive letters which he has written to VS and some

inspection reports and other official documents which he has returned to this office after crumpling them, defacing them, urinating on them and writing obscenities on some." These lies, obviously made to cover up Maas' urinating by Petitioner's water well, were also indicative of the Respondent's desire and intent to retaliate for his exercise of his freedom of speech. Additionally, Petitioner never returned his copies of inspection reports which suggests theft or fabrication or both. Kirchberg's report was acquired via a Freedom of Information Act request; and appeal, after it was claimed that all records had been destroyed. More FOIA appeals are pending since the USDA is not responding to Petitioner's requests truthfully or completely, and Petitioner's Request for Production of Documents was denied by Respondents.

Petitioner brought a Bivens action against the Respondents in the St. Louis County District Court of Minnesota. On January 12, 1991, the action was removed to the United States District Court, District of Minnesota, Fifth Division. Jurisdiction was invoked under Title 28 U.S.C. 1331, 1346, and 1332. On March 9, 1992, Respondents filed their Motion to Dismiss or, in the Alternative, for Summary Judgment. On April 23, 1992, the United States was submitted as defendant and Respondents were certified as acting within the scope of employment by the United States Attorney. On May 28, 1992, Respondent's motion for dismissal was heard before Magistrate Judge Raymond L. Erickson who ordered supplemental briefs to be submitted. On January 7, 1993, Magistrate Judge Erickson filed his Report and Recommendation. On January 20, 1993,

Petitioner filed his objections to the Report and Recommendation. On February 1, 1993, Respondents filed their response to Petitioner's objections to the Report and Recommendation. On February 23, 1993, the District Court issued its Order that the Magistrate Judges Report and Recommendation was accepted in whole, and Petitioner's Complaint was dismissed for lack of jurisdiction. Petitioner filed his motion to vacate or amend judgment, and/or for a new hearing on all the issues or, in the alternative, for relief from judgment. On March 15, 1993, Respondents filed their response to Petitioner's motion to vacate or amend judgment, and/or for a new hearing on all the issues or, in the alternative, for relief from judgment. On March 30, 1993, the District Court issued its Order denying Petitioner's motion to vacate or amend judgment. On April 28, 1993, Petitioner

filed a timely Notice of Appeal. Petitioner requested and was granted an additional 14 days in which to file his brief and on June 29, 1993, Petitioner submitted his timely brief to the Court of Appeals for the Eighth Circuit. Respondents similarly requested and were granted additional time to file their brief; and did file their timely brief. Petitioner's arguments in his brief were essentially the same as those embodied in this Petition for Writ of Certiorari and those he has argued consistently throughout this litigation, which are: that he did not meet the 9 CFR Section 1.1 (t) definition and requirements of a "dealer"; that he was not engaged in any activity subject to the AWA; that he could not legally be licensed as a dealer, but only as an exhibitor; that he had applied only for a Class C (exhibitor) license which was denied, the application fee returned, and that should

have been the end of any connection to any USDA license; that the USDA could not substitute a useless and illegal Class B license and hold Petitioner subject to its provisions, especially when he rejected it and willfully did not pay the license fee; that he had voluntarily terminated his unapproved 1985 Class B license by specifically applying for a Class C license when a licensee is permitted to possess only one class of license, and by specifically rejecting it after it was issued to him instead of the applied for Class C license; that even if the Class B license actually existed, it was automatically terminated by law before the warrantless, consentless, without his presence or knowledge, searches occurred; that even if the Class B license actually existed, the warrantless and consentless searches were still prohibited during the absence of the licensee and any

agent of his and without their knowledge; that, additionally, the searches, under any circumstances, were conducted in areas beyond the scope and authority of the AWA; that for those reasons, the searches were unreasonable, and in violation of Amendment Four of the United States Constitution; that the searches conducted in Petitioner's absence, denied him the right and opportunity to voluntarily terminate his license, if it actually existed, which would have terminated the searches at their onset, thus, Petitioner's rights under the due process clause of the Fifth Amendment of the United States Constitution were violated; that the illegal acts of the USDA agents in fabricating evidence, falsifying official documents, including affidavits under oath, and attempting to maliciously prosecute and fine him $5000, urinating by his water well, were deliberately done in retaliation for

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

KENNETH S. BENIGNI,

PETITIONER,

VS.

DONALD W. MAAS, JOHN F. KIRCHBERG,
DENNIS MUNSON, AND P.M. EPPELE,

RESPONDENTS,

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KENNETH S. BENIGNI
PETITIONER PRO SE
7485 Kauppi Lake Road
Cotton, Minnesota 55724
Tel: (None)

Petitioner's use of his freedom of speech to criticize other illegal or improper government acts, which violated his rights under Amendment One of the Constitution of the United States; that the effect of the USDA agents' illegal acts was to destroy any possibility of Petitioner ever obtaining a Class C license to operate his zoo, or being able to operate it without fear of more false and serious charges, based on fabricated evidence, being brought or leveled against him by USDA or other government agents in retaliation for his seeking redress for his grievances, or otherwise criticizing or exposing the Respondents; that Petitioner's rights to earn a living in a lawful business, to use his property according to his will, and to engage in his chosen profession under the Fifth Amendment of the Constitution of the United States were violated; that the acts

of the USDA agents, including criminal acts, were not done in the scope of their employment, and the United States cannot be substituted as the Defendant; that possible separate claims for malicious prosecution and the intentional infliction of mental distress, based on evidence of fraudulently concealed until discovered in Respondents' brief served on Petitioner after being mailed April 23, 1992, subject to the Federal Tort Claims Act, provided Petitioner files a properly executed Form 95 to the USDA within the 2 year statute of limitations; are viable and not affected by the instant case; that summary judgment would be improper since Respondents had refused Petitioner's request for the production of documents; and, that the District Court had abused its discretion by overly deferring to the Respondents' Declarations which their previously made

affidavits showed were perjurious in material and critical matters.

The Court of Appeals for the Eighth Circuit held: that it was undisputed that Petitioner had not derived more than $500 in 1985 or 1986; that, however, the regulations allowed individuals to be licensed under the AWA even if they did not meet the technical requirements of a dealer or exhibitor; that the status of Petitioner's 1985 license was immaterial; that Petitioner's claim that he had terminated his Class B license was unfounded; that the Administrative Procedure Act (5. U.S.C. Section 558 (c)) requires a written notice and opportunity to achieve compliance before a license can be revoked or suspended; that Petitioner was a licensed dealer and thus subject to the AWA; that the warrantless administration searches were reasonable and not in violation of the Fourth Amendment; that Petitioner's actual

presence at the searches, which were conducted in his absence was immaterial; that Petitioner had given consent to the searches; that Petitioner did not exhaust his administrative remedies subject to the FTCA and, thus, the District Court was without subject matter jurisdiction, and therefore, the Eighth Circuit did not need to address the issue of deference to the certification of scope of employment, the malicious prosecution claim, or the contamination claim; and that, the District Court did not abuse its discretion in denying Petitioner's motion to alter or amend the judgment. The Eighth Circuit, however, failed to address the issues of: Were searches conducted in areas beyond any authority of the AWA unlawful and unreasonable? Were the criminal acts of deliberately falsifying official documents outside the scope of the agents' employment?

Did the District Court err in relying on the Respondents' proven to be perjurious declarations that Petitioner was buying and selling animals in concluding that he was a dealer? and, whether the District Court erred in denying the Petitioner's motion to vacate by dismissing Petitioner's newly discovered evidence is hearsay legal conclusions when, in fact, Petitioner's affidavit clearly states that Petitioner was a party to the conversations, that he has tapes of the conversations, that he has telephone bills confirming the calls to the other party, who was in fact, a former USDA agent who had participated in the licensing purpose inspection of Petitioner's zoo facilities on August 20, 1986 and whose sworn Affidavit concerning that event appears in the Respondents' exhibits, and who admits that the agents never entered the skunk building in which several violations

were falsely listed on their official USDA inspection report, and, in fact, the agents never even saw the animals in that building. Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was denied January 21, 1994.

REASONS FOR GRANTING WRIT

Certiorari should be granted for three reasons. In holding that the actual presence of the owner/licensee, or an agent of his, during an administrative search of his premises, without him, or any agent of his having any knowledge of the search, is immaterial; the Eighth Circuit has decided an extremely important question of federal law which had not been, but should be settled by this Court and which in other aspects conflicts with applicable decisions of this Court.

In holding: (a) that Petitioner was a licensed dealer at the time of the searches,

when numerous facts make that an impossibility, and (b) in not addressing the issue of the certification of scope of employment, when criminal acts and deliberate violations of Amendments, One, Four and Five were certified to be within the scope of employment; the Eighth Circuit has so far departed from the accepted and usual judicial proceedings, that its departure calls for an exercise of this Court's power of supervision.

Because the issue of searches without presence, knowledge, consent, or warrant concerns a matter of grave national consequences, it will be addressed first, although the logical sequence would be to address the issue of licensure first.

SEARCHES WITHOUT PRESENCE, KNOWLEDGE, CONSENT, OR WARRANT

Reasonableness, has always been the cornerstone of this Court's decisions

pertaining to the Fourth Amendment of the United States Constitution. (petition at 4) Barring exigent circumstances, administrative searches conducted during the absence of the owner/licensee, or any agents of his, and without his/their knowledge or consent, and without warrant, i.e. in secret, are unreasonable. For a licensee, owner, or manager of a business subject to administrative searches, to have to live in constant fear that the minute he or his agents are absent during arbitrary "business hours", defined by clock and calendar, rather than by facts and circumstances, government agents, without his or his agents' consent or knowledge, and without warrant, can swarm all over and through his business premises and possessions, is not only unreasonable, it's outrageous Not only is the Fourth Amendment offended, but the due process clause of the Fifth Amendment is

also offended since such searches rob the licensee, owner, or manager of his right to insist that the government agents comply with statutory safeguards and/or his own security requirements, or to limit the extent of the search. It also robs him of his right to see credentials and monitor the activities of the government agents, or to insist on a warrant, regardless of whether penalties might issue for that insistence,or to simply voluntarily terminate his license at the onset of the search which would terminate the search by reason of the elimination of the authority to conduct the search.

In the leading cases relating to administrative searches that came before this Court; specifically: Camara v. Municipal Court, 387 U.S. 523 (1967); United States v. Bisswell, 406 U.S. 311 (1972); Donovan v. Dewey, 452 U.S. 594 (1981); Marshall v.

Barlow's, Inc., 436 U.S. 307 (1978); and New York v. Burger, 482 U.S. 691 (1987), all are distinguishable in that the lessee, licensee, owner, or his agent was always present, and thus, this Court was not presented with the opportunity to specifically settle the question of: Is an administrative search conducted during the absence of the owner/licensee, or any agents of his, without his/their knowledge or consent, and without warrant, (essentially in secret) in violation of the Fourth Amendment of the United States Constitution? Knowledge of and presence of extremely basic factors relevant to any search. Their exclusion makes administrative searches a whole new ball game; reaching all regulated or quasi-regulated businesses and should be addressed by this Court. The Eighth Circuit's holding that knowledge of or presence at the administrative search by the

licensee/owner, or any of his agents is immaterial has essentially wrested all right of control of their own property and premises from business owners or managers. Under this holding, government agents can simply wait until the owner or his agents go to lunch; go shopping; go to the hospital; go to a funeral; go on a vacation; or go on a honeymoon; and then enter the premises and run amok for days. Such searches are patently unreasonably. Without the owner/licensee or his agent being present during the search, it is impossible for him to: monitor the activities of the government agents; prevent their entrance into areas not covered by the authority of the agents; check their credentials to prevent unauthorized persons being slipped in; learn the agents' identity; prevent contraband being brought in to possibly frame him for crimes or violations; prevent disease being

brought in; prevent disease being taken out; prevent the agents from being exposed to disease, dangerous conditions like: high-voltage lines, attack dogs, dangerous animals, quicksand, or deadly chemicals; know if the agents are really agents and not burglars, an uncertainty which could easily result in the death of the agents or of the owner/licensee or his agent(s); or, as the instant case explicitly demonstrates; to be aware of the wholesale falsification of documents and the fabrication of evidence intended to be used to maliciously prosecute Petitioner in retaliation of his criticism of illegal or improper acts of government agents; and to prevent the contamination of his water supply.

In the instant case, the District Court's reliance (Appendix at 55a) on 9 CFR Section 2.126 (petition at 11) which states in pertinent part:

> Each dealer, exhibitor, operator of an auction sale, or research facility, shall, during ordinary business hours, permit Veterinary Services representatives, or other Federal officers or employees designated by the Secretary, to enter his place of business...(emphasis added)

is unfounded. The record shows that Petitioner was not engaged in any business. He did not buy, sell, or exhibit any animals during 1985 or 1986. Thus, his premises were not a "place of business". This fact also precludes the existence of "business hours" which imply a business is being conducted there. Moreover, although 9 CFR Section 2.126 uses the term "during ordinary business hours", Public Law 91-579, 84 Stat 1560 (Animal Welfare Act of 1970) (petition at 13) used the term "at all reasonable times" (emphasis added). During one's absence is not a reasonable time. Additionally, since it is undisputed that Petitioner applied for a Class C license, on

the official application form, and that application was rejected and Petitioner's $10 application fee returned, (Appendix at 2a) that act terminated anything Petitioner may have agreed to comply with on the application form. His agreement to comply became null and void. There was no contract or agreement entered into. Thus, Petitioner was not subject to any of the requirements under the AWA. Moreover, 9 CFR Section 2.128 (petition at 12) provides in pertinent part:

> (a) Each dealer, exhibitor, operator of an auction sale and research facility shall, upon request, during ordinary business hours, permit, under the following conditions, police of law officers of legally constituted law enforcement agencies with general law enforcement authority...to enter the place of business of such dealer...to inspect animals and records for the purpose of seeking animals that are missing: (2) The police or law officer shall abide by all security measures required by the dealer, exhibitor, operator of an auction sale or research facility to prevent the spread of disease,

> <u>including the use of sterile clothing, footwear, and masks where required, or to prevent the escape of an animal.</u> (emphasis added)

The fact that this AWA regulation requires that law enforcement officers make a request, and the licensee is authorized to demand the law enforcement officers abide by all of his security measures, precludes any possibility that the search could be made without the licensee or an agent of his being aware of the search, either by his presence, or by the required request, at which time he could require his present as one of his easily understandable security measures. Petitioner did not argue that administrative searches were impermissible without a warrant as the Eighth Circuit implies. (Appendix at 7a) They, of course, are; provided the person whose premises are being searched is duly licensed; and he or an agent of his is present, and the search

does not go beyond the scope and authority of the AWA. This was well understood by the USDA. The record shows that a letter written by USDA Administrator James W. Glosser to then, United States Senator, Rudy Boschwitz on April 3, 1989 concerning Petitioner and USDA searches, states in totally unambiguous terms:

> If he were to become licensed, our personnel would only inspect his facility when he was present.

A letter written by Respondent P. M. Eppele to all licensees, admits to, and complains of "unsuccessful inspection attempts". Were USDA agents permitted to search when licensees or their agents were not present, such unsuccessful inspections would not have occurred. Former USDA agent W. Scott Manning, who was present at the August 20, 1986 licensing purpose inspection of Petitioner's zoo facilities confirmed that USDA agents were not permitted to enter a

licensee's premises when no one was present, during a taped conversation in 1993; after Petitioner finally located him. Additionally, through a Freedom of Information Act (FOIA) request and appeal, Petitioner obtained a USDA, APHIS, REAC training manual entitled: "BASIC TRAINING MODULES" which has a section entitled: "ATTEMPTED INSPECTIONS", which states in pertinent part:

> "Since all routine inspections are unannounced, there may be times you arrive at the facility to find no one home. If this happens, do the following: 1. Make sure there is no one home. Knock loudly several times. Call out the person's name. If you are in a rural area, honk your horn a few times. 2. Check file for phone numbers to call (work, spouse, neighbor) see if they can be at the facility in 15-20 minutes. 3. If no response, wait in your car for 15-20 minutes to see if anyone comes. (Use this time to review files or regulations) If no one comes, fill out an attempted inspection report as follows:...First attempt...Second attempt...Third attempt...After you have made an attempt inspection, please do not return to the facility

> until <u>after</u> you have received a copy of the certified letter from the office. (emphasis in original)

9 CFR Section 2.5 provides in pertinent part: (petition at 10)

> (a) A license issued under this part shall be valid unless: (2) Said license is voluntarily terminated upon the request of the licensee in writing to the Veterinarian in Charge.

This section establishes that all a licensee need do is to hand the would-be searching agents a note made out to the Veterinarian in Charge requesting that his license be terminated and the authority for conducting the search is simultaneously terminated. That right of his is denied him if the opportunity to do so is precluded by a search conducted in his absence and without his knowledge in violation of both Amendment Four and Amendment Five of the United States Constitution.

Moreover, the USDA agents searched 12 buildings, 11 of which were 96 feet long,

none of which housed any animals whatsoever, and did not come under the authority of the AWA under any circumstances. The entire area was posted against trespassing and, in fact, Respondent Maas included sketches of some of those no trespassing signs in his notes. The searches were blatant intentional constitutional torts, excluded from the FTCA by 28 U.S.C. Section 2679 (b)(2)(A), (petition at 17). Therefore, the agents are liable under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)

THE IMPOSSIBILITY OF LICENSURE

Petitioner could not have been legally licensed as a dealer under the AWA at the time the searches occurred for several reasons, any one of which is sufficient to preclude any possibility of his having a valid Class B dealer license at the time of the searches. Public Law 94-279 and Title

7 U.S.C. Section 2132 (f) (petition at 5) states in pertinent part:

> (f) The term "dealer" means any person who, in commerce, for compensation or profit...buys or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet...except that this term does not include - (ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals any calendar year; (emphasis added)

Petitioner did not buy or sell any animals whatsoever in 1985 and 1986. There was absolutely no commerce involved. Not one cent changed hands. The matter is jurisdictional, Petitioner did not fit the definition of a dealer and the Animal Welfare Act did not have any jurisdiction over him as such. The matter should end there. Under 9 CFR Section 1.1 (w), Petitioner could have only qualified as an "exhibitor", (petition at 6) provided he had

been issued a Class C "exhibitor" license, and had actually engaged in the activity, which he was not and did not, respectively. He did not meet the requirements of a dealer in order to be granted a Class B license, and he was denied the Class C license he had applied for. He had no license at the time of the searches. The Eighth Circuit mistakenly concluded that Petitioner had sought to convert his Class B license to a Class C license in 1986. That attempt was made in 1985. (Appendix at 2a) The record shows that Petitioner stopped selling animals in 1984. In June of 1985, Petitioner requested a change from his Class B license, which was no longer legal or applicable to his needs, to a Class C license which was legally applicable to his needs and was required by law. The USDA ignored his request for the class of license change and sent him a letter which simply

said that his fee had been received, rather then; that his application had been approved, as had been done on 11 previous applications spanning 11 years. Without an approval, an application remains simply an application. Thus, the status of the 1985 is significant — one cannot renew what one does not have to begin with. Specifically to avoid the run around, ambiguity, and the failure of the USDA to respond to his request for a class of license change in 1985; in June of 1986, he applied specifically for a Class C license and enclosed the $10 Class C license fee and not the $5 Class B license fee; but he again was sent the useless, and illegal for his purposes, Class B license which he had not applied for. On August 18, 1986, Petitioner sent a certified letter to the USDA rejecting the Class B license which stated in pertinent part: "I acknowledged that I

had received my Class C license. However, I said that I wanted a Class C license inasmuch as I have no intention of selling animals." ("received my license" meant receiving approval for application) Petitioner's certified letter not only rejected the Class B license, but put the USDA on notice that he had no intention of selling animals (which precluded any need or use for a Class B dealer license). The fact that it was certified indicates that Petitioner considered the contents to be important. Since a licensee is permitted to have only one class of license, it is only logical to conclude that an application for a Class C license is a voluntary termination of the Class B license. Especially when followed by a letter rejecting the Class B license which was sent. USDA policy is reflected in a letter, obtained via an FOIA request by Petitioner, written to F. Miave

Binkley, Animal Care Specialist, Annapolis, MD by R.L. Crawford, Director, Animal Care Staff, Regulatory Enforcement and Animal Care, entitled: Policy — Change of License Class. It states:

> This is to clarify the policy concerning the procedures to follow when a licensee changes the class of license held. A change of license is a new license, and procedures must be followed to comply with the standards and regulations as with any new application for a license. When a Class A dealer changes the type of business to a Class B dealer, the licensee must apply for a new license prior to conducting any business involving animals which the dealer does not raise. All deficiencies must be corrected prior to issuance of a new license...In the case of a class C to a class B (or B to C) license, the dealer/exhibitor may be canceled at renewal date unless the facilities pass an inspection for a new license. The dealer/exhibitor is allowed to continue to operate until renewal because an exhibitor may buy and sell animals and a B dealer may exhibit. The licensee should be advised prior to termination of the license, that he/she does not meet the definition of the class of license that is being terminated and must therefore obtain a new license. If the licensee can

> provide proof that they do meet the definition then the license could be continued. The decision between a class B and class C license will depend upon which type of operation is the major part of the business (most income derived from it). (emphasis added)

Although written on December 13, 1991, 5 years after the searches, the letter, nevertheless states it was written to clarify the policy concerning license class changes, indicating the policies existed prior to the letter, and were, in fact, as Petitioner knew them to be in 1986. It does establish that great emphasis was put on strict adherence to the terms of the definitions of dealer and exhibitor, and that a change of license is a new license, and that licenses could, and were being terminated if they did not meet the requirements of those definitions.

The record further shows that Respondents were fully aware that Petitioner

wanted, and could only use a Class C license, and on August 20, 1986, three USDA agents all told him that he did not qualify for a Class C license, returned his $10 application fee and told him that he would have to pay the $5 renewal fee for the Class B license, which he did not apply for. (Appendix at 2a) Petitioner was explicitly told that he must send the $5 fee for the useless Class B license by all three agents individually. That certainly was sufficient notice; and considered to be such since all three agents included that information in their sworn affidavits within 2 days of the August 20, 1986 inspection. Moreover, Petitioner did not "request" a change of class of license, he applied specifically for the only license he could legally use, which was a Class C exhibitor license. It was a Class C license or nothing. Additionally, the denial of the Class C

license and the return of the application fee terminated the application, and released Petitioner from any conditions he may have agreed to on the application form, which was subject to the Class C license being issued. That was the end of any effort by Petitioner to enter into a contract for a license. There was no contract made. The USDA had no option to substitute a useless and unwanted and illegal, (for purely exhibiting purposes) Class B license.

Voluntary Licensure

The Eighth Circuit erred in concluding that the regulations in effect in 1986 allowed Petitioner to be licensed even if he did not meet the technical requirements of a dealer. (Appendix at 5a) 9 CFR Section 2.1 (b), (petition at 7) provides in part:

> (b) Any person who is not a dealer or exhibitor but desires to obtain a license, shall follow the requirements for dealers and exhibitors set forth in paragraph (a) of this section and

> in sections 2.2 and 2.3, and shall agree in writing, on a form furnished by Veterinary Services...(emphasis added)

While this regulation may have allowed voluntary licensure, that allowance is contingent upon their desire to obtain a voluntary licensure, not the USDA's desire to license them. The record shows that Petitioner had no desire to have a voluntary, useless Class B license, nor did he apply for one, nor did he sign any special form for one, nor have the Respondents ever claimed the existence of any such voluntary license. The Eighth Circuit's conclusion is contrary to the evidence and erroneous.

Automatic Termination

9 CFR Section 2.5(b) (petition at 10) provides in part:

> (b) Failure by a licensee to pay the annual license fee as required by

> section 2.7 on or before the anniversary date of his license shall result in automatic termination of the license: Provided, however, That prior to such termination the licensee shall be given notice and opportunity to comply with the annual license fee and reporting requirements. Failure to comply with the annual license fee and reporting requirements within 60 days from the receipt of such notice shall result in automatic termination of the license.

Since Petitioner deliberately did not send the USDA the demanded $5 Class B license fee for the renewal of the never approved 1985 Class B license, if it ever even existed, (there is not one shred of paper that indicates the 1985 application was ever approved or issued) by the terms of 9 CFR 2.5(b), it expired on October 20, 1986, 60 days after he was notified to send the $5 fee by three USDA agents individually on August 20, 1986. The Eighth Circuit erred when it accepted the District Court's conclusion that Petitioner first received notice on December 3, 1986. (Appendix at

6a) This "notice" was a "note" on the back of the inspection report made during the first search, and was left pinned to the door to Petitioner's house when it became known that Petitioner was 900 miles away (approximately) in Ohio, and did not provide the 60 days grace period, but rather an arbitrary 12 days. Petitioner never even saw the report and the note until about May 1, 1987 when he returned from Ohio. If this was sufficient notice, then the verbal notifications of three individual agents on August 20, 1986, <u>certainly</u> were sufficient notice. He had been provided with the pertinent regulations of 9 CFR Section 1.1 et seq. which provided all the notice he ever needed, and in fact, present USDA policy and regulations consider being provided with those regulations <u>is</u> sufficient notice. Moreover, any irregularity involving the Respondents'

responsibility should work to their prejudice, not to Petitioner's.

Written Notice Not Required

The Eighth Circuit erred by holding that the notice to pay the license fee must be in writing. (Appendix at 6a) Nowhere in 9 CFR Section 2.5 is written notice required. (petition at 10) Moreover, Petitioner's act of not paying the $5 fee was purely willful, and is thus excluded from the provisions of the Administrative Procedure Act, 5 U.S.C. 558 (c) (petition at 18) states in pertinent part:

> (c)...Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefore, the licensee has been given — (1) notice.... (2) opportunity.... (emphasis added)

Additionally; in Schwebel v. Orrick,

D.C.D.C. (1957), 153 F. Supp. 701, affirmed 251 F.2d 919, 102 U.S.App.D.C. 210, certiorari denied 78 S.Ct. 716, 356 U.S. 925; it was held that:

> This section providing that except in cases of "willfulness", revocation of any license shall be unlawful unless prior to institution of agency proceedings written notice is given to licensee, "willfulness" means the intentional doing of act charged.

and in: Atlantic Richfield Co. v. U.S. (1985), 774 F.2d 1193, 249 U.S.App. D.C. 224; it was held that:

> License that expires on its own terms is not protected by 5. U.S.C. Section 558 (c), governing withdrawal of licenses.

Thus, Petitioner was given adequate notice on August 20, 1986 and the Class B license, if it ever even existed, automatically terminated on October 20, 1986.

Letter Taken Out of Context

The Eighth Circuit's determination that Petitioner "requested" that APHIS void his

license is taken completely out of context. Petitioner clearly stated earlier in that same paragraph: "It should have been crystal clear to you that I had severed all connections with your agency when I did not send you the 5 dollar license fee..." and "Since your did not have enough sense to realize that, then this is a formal notification: I have severed any and all association with your disgraceful agency". (emphasis added) Those statements clearly indicate that Petitioner had severed any connection with the USDA when he deliberately did not send the fee for the unwanted and unapplied for Class B license. Petitioner's statements were made in the past tense. One does not make requests in the past tense. It is not disputed that Petitioner concluded the letter with "Void my license immediately." However, since he knew he didn't have a license anymore, but

a mob of USDA agents were pretending he did and were swarming all over his property and through his buildings, and urinating where it certainly contaminated his water supply, and he was 900 miles away and couldn't guard his farm, and he wanted those outrageous acts to stop immediately; he had to say <u>something</u> to get the message across and get the agents <u>off</u> his property. Those were the words that came out. He could have said "take your phoney license and shove it, and don't you ever put one foot on my land again." The thrust is the same. However, the letter is mere surplusage; the license was already terminated by the provisions of the AWA on October 20, 1986; if it ever even existed in the first place. <u>Especially</u> since Petitioner couldn't meet the definition of dealer, and wasn't involved in any commerce whatsoever to bring him under the authority of the AWA. Legal issues

aside, if Petitioner had wanted a Class B license; all he had to do was send the USDA $5, simple as that. As he had done previously for 11 years. But he didn't. In writing; in words; and by his actions; Petitioner said No to a Class B license. When a woman says No to sexual demands of a man; is he entitled to rape her anyway; because she didn't provide him with a lawyer authored refusal? Petitioner thinks, not.

SCOPE OF EMPLOYMENT

The record shows that Respondents Maas, Kirchberg, and Munson, under the supervision of Respondent Eppele, conducted 4 searches of Petitioner's premises, including 12 buildings, 11 of which were 96 feet long, containing no animals whatsoever, and were beyond any authority of the AWA, during Petitioner's absence, without his knowledge or consent, and without warrant, in

violation of the Fourth Amendment of the United States Constitution; (petition at 4) deprived Petitioner of his right to terminate the search(s) by voluntarily terminating his license (if it actually existed) thereby removing the authority to conduct the search(s) in violation of the due process clause of the Fifth Amendment of the United States Constitution (petition at 4); fabricated evidence and falsified government documents in violation of Title 18 U.S.C. Section 1001 which is a felony, punishable up to 5 years in prison and/or a $10,000 fine (petition at 15); later sent the falsified documents to the Chief Staff Officer of the VS, APHIS Compliance and Enforcement Program "in order to commence enforcement proceedings" and the case was then sent to the Office of the General Counsel for legal action with a recommendation that Petitioner be fined

$5,000. The record further shows that Maas urinated in very close proximity to Petitioner's drinking water supply, thereby contaminating it. The agents violated their own USDA regulations against "Engaging in criminal, infamous, dishonest, or notoriously disgraceful conduct, or other conduct prejudicial to the Government." (7 CFR Subtitle A, Sec. 0.735-11)(petition at 14) Maas also falsified other official government documents on August 13, 1985 and August 20, 1986. The record contains examples of the agents' animosity to Petitioner's use of his freedom of speech to criticize the unlawful acts or improper conduct of government agents or officials which strongly suggests that the agents were strongly motivated to retaliate against him for his exercise of his freedom of speech in violation of the First Amendment of the United States Constitution (petition at 3) And, to intentionally inflict mental anguish

upon Petition for his criticism of government agents' unlawful or improper acts. The deliberate prevention of Petitioner, through the unlawful acts of the agents, to use his land as he chose, and to engage in his chosen profession, further violated his property and liberty rights under the Fifth Amendment of the United States Constitution. (petition at 4)

None of the above acts of the agents could possibly be in the interest of their employer, the United States. They are the antithesis of the interest of the United States. Their acts were not contemplated by their employer. Their acts were not within the scope of their employment. Moreover, Title 28 U.S.C. Section 2679 (b)(2)(A) (petition at 17) states in pertinent part:

> (2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government — (A) which is brought for a violation of the Constitution of the United

States....

For these reasons the United States cannot be substituted as the Defendant. The Eighth Circuit erred by finding, and by deferring to the United States Attorney's Certification of Scope of Employment, that the Respondents were acting within the scope of employment. That finding is completely unsupported by the evidence.

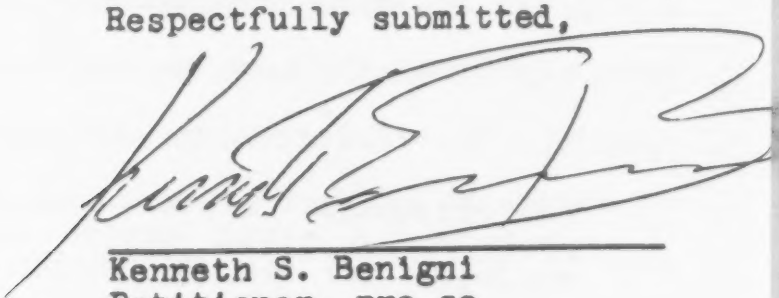
CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Dated: April 20, 1994.

Substitution, pursuant to Supreme Court Rule 33.7, dated: May 22, 1994.

Respectfully submitted,



Kenneth S. Benigni
Petitioner, pro se

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 93-2134

Kenneth S. Benigni,	*	
	*	
	*	
Appellant,	*	Appeal from the
v.	*	United States
	*	District Court for
Donald W. Maas; John	*	the District
F. Kirchberg; Dennis	*	of Minnesota
Munson; P. M. Eppele,	*	
	*	[UNPUBLISHED]
Appellees.	*	

Submitted: November 1, 1993
Filed: December 8, 1993

Before JOHN R. GIBSON, MAGILL, AND BEAM, Circuit Judges.

PER CURIAM.

Kenneth Benigni appeals the district court's[1] dismissal of his Federal Tort Claims Act (FTCA) cause of action and his Bivens claim. We affirm.

From 1973 to June 1986, Benigni was a licensed animal vendor, pursuant to the Animal Welfare Act (AWA), 7 U.S.C. § 2131, et. seq. On June 3, 1986, Benigni notified the Animal and Plant Health Inspection Service (APHIS) that he wanted to convert his Class B "dealer" license to a Class C "exhibitor" license, and sent the $10 application fee for a Class C license. APHIS renewed Benigni's Class B license until June 26, 1987. On August 20, 1986, APHIS officials inspected his operation. Benigni was told that he did not qualify for a Class C license. The inspectors returned Benigni's Class C application fee and told Benigni that he would have to pay the $5 renewal fee for his Class B license.

Shortly thereafter, Benigni left

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[1]The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota.

Minnesota for Ohio and left the care of his animals to his neighbors. On December 3, 1986, defendants Maas, Krichberg, and Munson, all APHIS employees, inspected Benigni's farm and posted a list of deficiencies on his front door. Follow-up inspections occurred on December 4, 5 and 10, 1986. On February 3, 1987, Benigni wrote a letter to defendant Eppele, APHIS Veterinarian in Charge, expressing his discontent with APHIS inspecting his property in his absence and expressly requesting that APHIS void his license. Eppele terminated Benigni's license on February 10, 1987.

Benigni, pro se, brought this Bivens action for alleged violations of his Fourth Amendment rights, along with tort claims stemming from the December 1986 inspections. Over Benigni's objections, the district court adopted the magistrate judge's[2]

lengthy and thorough report and granted the defendants' motion to dismiss. After Benigni's motion to vacate or amend the district court's order was denied, he timely appealed.

Benigni contends that the district court erred in finding that he was a dealer and thus subject to the AWA because he did not meet the transactional requirements of a "dealer"; his 1985 license was not renewed; he rejected his 1986 Class B license; and he never paid his 1986 Class B license renewal fee and, therefore, his license automatically terminated before the searches occurred. It is undisputed that Benigni had not derived more than $500 in animal sales in 1985 or 1986. See 9 C.F.R. § 1.1(t) (1986). The regulations in effect

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[2]The Honorable Raymond L. Erickson, United States Magistrate Judge for the District of Minnesota.

in 1986, however, allowed individuals to be licensed under the AWA even if they did not meet the technical requirements of a dealer or an exhibitor. See 9 C.F.R. § 2.1(b) (1986). Also, Benigni fails to acknowledge that he sought a renewal of his Class B license and that this license was renewed from June 26, 1986, to June 27, 1987. The status of his 1985 license is immaterial. Benigni's claim that he terminated his Class B license is unfounded. His August 18, 1986 letter APHIS does not clearly convey a desire to terminate his Class B license. Further, on August 20, 1986, APHIS inspectors told Benigni that he need not be licensed under the AWA at all. Benigni, however, refused to surrender his Class B license.

Benigni contends that even if he had a Class B license, it expired after he failed to pay the renewal fee. Benigni relies on

9 C.F.R. § 2.5(b) (1986) for support that his 1986 Class B license terminated prior to the December searches. Section 2.5(b) states that a failure to pay the renewal fee will automatically terminate a license sixty days after the licensee receives notice and an opportunity to comply. 9 C.F.R. § 2.5(b) (1986). Benigni contends that he received notice during the August 20, 1986 inspection of his premises and that his license, therefore, terminated around October 20, 1986, because of his failure to pay the renewal fee. The district court determined that Benigni received notice on December 3, 1986, when the defendants posted a list of deficiencies on Benigni's door. The Administrative Procedure Act requires that a licensee receive written notice and an opportunity to achieve compliance before a license can be revoked or suspended. 5 U.S.C. § 558(c) (emphasis added); cf. Cox v.

United States Dep't of Agric., 925 F.2d 1102, 1104 n.8, 1105 (8th Cir. 1991) (applying the APA to an AWA case), cert. denied, 112 S. Ct. 178 (1991). Notice in this context must be in writing; the August 20, 1986 conversation did not suffice. The district court correctly determined that Benigni was a licensed dealer and thus subject to the AWA.

Benigni next asserts that the district court erred in finding that the AWA authorizes warrantless searches of dealers. Warrantless administrative searches are permissible when the business is closely regulated and the regulatory rules limit the scope of the search. New York v. Burger, 482 U.S. 691, 702-03 (1987); Western States Cattle Co. v. Edwards, 895 F.2d 438, 441 (8th Cir. 1990). Warrantless administrative searches are only reasonable when three criteria are met: (1) the administrative

scheme concerns a substantial government interest; (2) the warrantless search is necessary to further the regulatory scheme; and (3) the rules governing the inspection offer a constitutionally adequate substitute for the Fourth Amendment warrant requirement by limiting the time, place and scope of the search. Burger, 482 U.S. at 702-03. The district court applied the Burger criteria and found that AWA warrantless administrative searches were reasonable and not in violation of the Fourth Amendment. Upon de novo review, we find the district court was correct.

The AWA addresses a substantial government interest. See 7 U.S.C. § 2131(1). Congress recognized the need for federal legislation because abuse of animals occurs nationwide and state laws are ineffective in preventing abuse. S. Rep. No. 1281, 89th Cong., 2d Sess. (1966),

reprinted in 1966 U.S.C.C.A.N. 2636-37. The Supreme Court has upheld as a substantial government interest similar purposes advanced in other statutory schemes. Ct. Donovan v. Dewey, 452 U.S. 594, 602 (1981) (substantial federal interest in improving safety of nation's mines); United States v. Biswell, 406 U.S. 311, 315 (1972) (regulating firearms of central importance to federal efforts to prevent violent crime and to assist states in regulating firearms).

In Burger, the Supreme Court found warrantless administrative inspections of automobile junkyards necessary to further the regulatory scheme. The Court stated that "because stolen cars and parts pass quickly through an automobile junkyard, 'frequent' and 'unannounced' inspections are necessary in order to detect them. In sum, surprise is crucial..." Burger, 482 U.S. at

710. Likewise, surprise inspections are crucial to detect violations of the AWA which can be covered up quickly. See Biswell, 406 U.S. at 316; Cox, 925 F.2d at 1107 (refusal to allow inspection prevents detection of AWA violations). The need for a warrant could frustrate the purposes of the AWA.

The statutory scheme must be sufficient comprehensive and defined that owners of commercial property are aware that their property will be subject to periodic inspections. Burger, 482 U.S. at 691. The AWA expressly authorizes administrative inspections. See 7 U.S.C. § 2146(a). In addition, regulations promulgated by the Secretary allow for inspections. See 9 C.F.R. § 2.126 (1986). Each applicant for a license or a renewal of a license must acknowledge receipt of a copy of the

regulations and agree to comply with them. See 9 C.F.R. § 2.2. It is inconceivable that a licensed dealer would have any doubt about being subject to routine and regular compliance inspections. In summary, after review of the Burger requirements, we hold that the AWA authorizes warrantless administrative inspections.

Finally, Benigni argues that the searches were illegal because they were conducted in his absence. As discussed above, individuals licensed under the AWA cannot help but be aware that their property will be inspected. Agreeing to the extensive regulations by becoming licensed is deemed to be consent to administrative inspections. Marshall v. Barlow's, Inc., 436 U.S. 307, 313 (1978). In addition, notice of future inspections is also given by the statute itself and the signing of the agreement to abide by the statute and

regulations. Western States Cattle, 895 F.2d at 442 n.4; see also 9 C.F.R. § 2.2 (1986) (acknowledgement of standards). As Benigni gave consent to, and received notice of, future inspections, his actual present was immaterial.

FTCA claims against the government must be presented to the appropriate federal agency within two years after the claims accrue. 28 U.S.C. §§ 2401(b), 2675(a). Benigni failed to exhaust his administrative remedies because he never presented his claims to any federal agency. As Benigni has demonstrated no grounds for equitable tolling, the district court correctly determined that it was without subject matter jurisdiction. See Niccolai v. United States Bureau of Prisons, No. 92-3021, 1993 WL 347119, *2 (8th Cir. Sept. 15, 1993). We, therefore, need not address the issue of deference to the certification of scope of

employment, the malicious prosecution claim, or the contamination claim.

Finally, the district court did not abuse its discretion in denying Benigni's motion to alter or amend the judgment. See Concordia College Corp. v. W.R. Grace & Co., 999 F.2d 326, 330 (8th Cir. 1993).

Accordingly, we affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Kenneth S. Benigni,

Plaintiff,

Civil No. 5-91-183

v.

ORDER

Donald W. Maas, John F. Kirchberg, Dennis Munson, and P.M. Eppele,

Defendants.

Plaintiff Kenneth S. Benigni objects to Magistrate Judge Raymond L. Erickson's Report and Recommendation that Benigni's complaint be dismissed for lack of jurisdiction.

Benigni brought this action seeking damages for alleged Fourth Amendment violations, trespass, damage to property, adulteration of documents, infliction of emotional distress, and for purported violations of the Minnesota Constitution.

These claims stem from several inspections of his animal facilities pursuant to the Animal Welfare Act (AWA), 7 U.S.C. § 2131 et seq. (1988), by employees of the United States Department of Agriculture (USDA) and the Animal and Plant Health Inspection Services (APHIS).

Magistrate Judge Erickson concluded that the inspections Benigni complains of were reasonable warrantless administrative searches and therefore did not violate the Fourth Amendment. As to the state law claims, Magistrate Judge Erickson concluded that the alleged acts were performed within the scope of employment and thus that Benigni's sole remedy is under the Federal Tort Claims Act (FTCA). As a jurisdictional prerequisite, the FTCA requires that plaintiffs submit their claims to the appropriate federal agency within two years of the accrual of their causes of action.

28 U.S.C. § 2401(b) (1988). Because Benigni has not filed a claim with the USDA or APHIS and more than two years have elapsed since the inspections, Magistrate Judge Erickson concluded that the Court has no subject matter jurisdiction over his potential FTC-A claims.

The Court reviews de novo those portions of the magistrate judge's report to which the parties object. D.Minn. L. R. 72. 1(c)(2). Benigni objects to the Report and Recommendation on the grounds that he was insulated from APHIS inspections because he was not a "dealer" under the AWA, and that the inspections did not comply with AWA standards for administrative inspections.

After carefully reviewing Magistrate Judge Erickson's report and Benigni's objections to it, the Court concludes that Benigni was a licensed dealer at the time

of the inspections and that the inspections did comply with the AWA standards.

Accordingly, based upon the entire record the court ORDERS that Magistrate Judge Erickson's Report and Recommendation of January 7, 1993, is ACCEPTED IN WHOLE. Therefore, the defendants' motion to dismiss is GRANTED and Benigni's complaint is DISMISSED for lack of jurisdiction.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: February 22, 1993.

RICHARD H. KYLE, Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

* *

Kenneth S. Benigni,

Plaintiff,

v.

Donald W. Maas, John F. Kirchberg, Dennis Munson, and P.M. Eppele,

Defendants.

REPORT AND RECOMMENDATION

Civil No. 5-91-183

* *

At Duluth, in the District of Minnesota, this 7th day of January, 1993.

I. Introduction

The above-entitled matter came before the undersigned United State Magistrate Judge, pursuant to a special assignment made in accordance with the provisions of Title 28 U.S.C. § 636(b)(1)(B), upon the Defendants' Motion for an Order which would dismiss this action or, in the alternative, would grant them Summary Judgment. A

Hearing was held on the Motion, at which time the Plaintiff appeared pro se, and the Defendants appeared by Friedrich A. P. Siekert, Assistant United States Attorney.

For reasons which follow, we recommend that Plaintiff's Complaint be dismissed for lack of subject matter jurisdiction.

II. Procedural and Factual Background

By this action, which was commenced on November 30, 1991, the Plaintiff seeks damages for alleged violations of his rights guaranteed under the Fourth Amendment of the United States Constitution, and for asserted acts of trespass, damage to property, adulteration of documents, emotional distress, and a purported violation of the provisions of the Minnesota Constitution. The Defendants are officers and employees of the United States Department of Agriculture ("USDA"), Animal and Plant Health Inspection Service ("APHIS"), who are each responsible,

in some capacity, for the inspection of animal facilities and for the enforcement of the Animal Welfare Act ("AWA"). Title 7 U.S.C. §2131, et seq. The facts which underlie the Plaintiff's claims may be briefly summarized.

The Plaintiff has been continuously licensed by the USDA, as a dealer of animals, from June 25, 1973 until February 10, 1987. On May 1, 1986, the Defendant P. M. Eppele, who was the Area Veterinarian-in-Charge of the Minnesota Branch of Veterinary Services for APHIS, sent a letter to the Plaintiff advising that his Class B license would expire on June 26, 1986, and that, if he wanted the license to be renewed, he would be required to sign an application form that had been enclosed with the letter, and pay the application fee. The letter also informed the Plaintiff that, if he decided to discontinue his license, he was

obligated to notify APHIS by letter and to return his license certificate for termination.

On June 3, 1986, the Plaintiff signed the license application and transmitted it by mail, along with a written request that his license be changed from Class B dealer's license to a Class C exhibitor's license. The Plaintiff also enclosed the appropriate application fee for a Class C license. Nevertheless, instead of receiving a Class C license, the Plaintiff received a Class B license from the APHIS.

On August 18, 1986, the Plaintiff wrote to Eppele requesting information on ultrasonic fly repelling devices, and seeking a means to substitute a Class C license for a Class B license which APHIS had sent to him.

On August 20, 1986, the Defendants Donald W. Maas ("Maas"), John F. Kirchberg

("Kirchberg"), and Dr. W. Scott Manning, all of whom were employees of APHIS, conducted an inspection of the Plaintiff's premises at the direction of Eppele.[1] The Report which followed that inspection revealed new and previously recurring deficiencies, as had been noted during a prior inspection on August 13, 1985 as they related to the manner in which the Plaintiff was caring for his animals and was operating his facility. At the time of the most recent inspection, Kirchberg returned the Plaintiff's $10.00 application fee and requested that the

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[1]According to APHIS inspection records, on August 20 and December 3, 4, 5 and 20, 1986, the Plaintiff held in confinement at least 9 skunks, 5 wolves, 1 fox and 1 raccoon which, in the judgment of APHIS personnel, were restricted in primary enclosures under conditions that did not comply with the Animal Welfare Act ("AWA") or the minimum standards for animal care as required by 9 C.F.R. Chapter 1, Subchapter A, Part 3, Subpart F. The Plaintiff denies that any violations of the AWA, or of the applicable regulations, occurred.

Plaintiff return his Class B License Certificate, which the Plaintiff refused to do as he wished to remain licensed by the USDA.

Shortly thereafter, the Plaintiff left his home to travel to the State of Ohio, where he stayed until the Spring of 1987. While he was out-of-state, Stan Miller ("Miller") and his wife, who were friends of the Plaintiff, assumed responsibility for the care of the Plaintiff's animals. Apparently, the Millers were unable to attend the animals with a greater frequency then two times per week because of their own employment activities, and they were required to carry water from their home to the Plaintiff's property for the use of the animals.[2]

On August 26, 1986, Eppele directed a letter to the Plaintiff informing him that

he was required to correct all of the deficiencies that had been reported during his last inspection, by October 5, 1986. In response to the Plaintiff's concern that he would not be able to exhibit animals without a Class C license, Eppele's letter also advised that the Plaintiff would be able to exhibit animals with his current Class B license.

At the direction of Eppele, Messrs. Maas, Dennis Munson ("Munson"),and Kirchberg inspected the Plaintiff's premises on December 3, 1986. At that time, they found that the door to the Plaintiff's house had been padlocked, and they observed no evidence that anyone had been on the

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[2]During the course of the Hearing in this matter, the Plaintiff explained that water was available on his property, but that the Millers would have been required to prime his water pump, which would freeze in the winter, in order to draw water from his well.

property since at least one day earlier. Their inspection report reflected numerous deficiencies, including those that had been previously noted on the August 20, 1986, inspection report. A copy of the inspection report was left attached to the door of the Plaintiff's house. In the "Recommendations" section of the report, the inspectors wrote as follows:

> Note: Have not received license fee for current year. License may be canceled unless $5.00 license fee is received by 12/15/86.
>
> Mr. Benigni: If you do not wish to keep your license, please return the original license certificate to to [sic] our St. Paul office.

The report was signed by Kirchberg, Maas and Munson.

On December 4, 1986, Maas and Kirchberg returned to the Plaintiff's premises for a follow-up inspection and in order to check on the status of his animals. Once again, they observed no evidence that anyone had

been on the premises since their visit on the previous day. The inspection report indicated that the previous deficiencies were still in existence and that one additional deficiency was detected.

On December 5, 1986, Maas returned to the Plaintiff's premises, discerned no evidence that anyone had been there to care for the animals, and he noted that the previously reported deficiencies had not been remedied.

On December 6 and 7, 1986, Miller fed at least some of the Plaintiff's animals and placed burlap sacks, as a bedding material, in some of the animal cages. Miller observed numerous footprints around the farm and in the sheds where the Plaintiff housed his animals. Miller also found a note, signed by the Defendant Maas, that had been posted on the door to the Plaintiff's house.

Within the following days, Maas and

Kirchberg reported to Eppele that they believed that an emergency condition existed on the Plaintiff's premises. Eppele directed Maas to re-inspect the facilities on December 10, 1986, and to take further steps to ensure the safety of the animals which were located there. Upon his inspection, Maas found that someone had been on the premises, had fed the skunks, and placed burlap sacks in some of the skunk cages, but had not corrected the noted deficiencies. A further deficiency was also discovered. Pursuant to Eppele's instructions, Maas made inquiries to determine who had been caring for the Plaintiff's animals, and he learned that the Millers were assuming that responsibility in the Plaintiff's absence. Maas spoke with the Millers and was advised that the Plaintiff had been out-of-state for several

months, that the Millers were only able to feed and water the animals once or twice per week, and that they had been hauling water to the animals from their own home.

On December 11, 1986, Miller returned to the Plaintiff's property and retrieved the report that had been posted on the Plaintiff's door. While there, Miller noticed a set of footprints in newly fallen snow which lead from the Plaintiff's front door to an area near the Plaintiff's well, where he observed evidence that someone had urinated there. On the basis of this evidence, the Plaintiff believes that Maas, who had posted the inspection report on the Plaintiff's door, had intentionally urinated so as to contaminate the Plaintiff's potable water supply. Maas has vehemently denied having performed any such act upon the Plaintiff's premises.[3]

On February 1, 1987, the Plaintiff learned about the APHIS inspections that had occurred during the previous December, and on February 10, 1987, the APHIS office received a letter from the Plaintiff, dated February 3, 1987, which was addressed to Eppele. The letter accused APHIS officers of conducting unauthorized searches, of falsifying inspection reports, and of urinating in the Plaintiff's well. The

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[3]We note that the Affidavit of Miller, while notarized, does not purport to express Miller's views as having been elicited pursuant to an oath or affirmation. The purpose of the notarization is quizzical. at best. Moreover, the comments of Miller were "notarized" nearly two years after the events, to which the comments were directed, occurred.

Despite these limitations in the recitations of Miller, and notwithstanding the facts that Miller's observations are directly contradicted by the nearly contemporaneous memorializations of Maas, we accepted Miller's statements as true for our purposes here. Miener v. State of Missouri, 673 F.2d 969, 972 n.3 (8th Cir 1982), cert.

letter also advised that the Plaintiff was desirous of terminating and of returning his license.

On February 10, 1987, Eppele responded by letter and advised the Plaintiff that his license had been terminated according to his request of February 3, 1987, and that the Plaintiff was to return his license to APHIS immediately. The Plaintiff returned his license to APHIS sometime between September 4, 1987 and September 29, 1987.

Upon these facts, the Defendants have moved the Court for an Order that dismisses this action pursuant to Rule 12(b)(1) and (6), Federal Rules of Civil Procedure, or for an award of Summary Judgment pursuant to

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denied, 459 U.S. 909 and 916 (1982); Jackson Sawmill Co., Inc. v. United States, 580 F.2d 302, 308 (8th Cir. 1979); cert. denied, 432 U.S. 1070 (1979); Buranen v. Hanna, 623 F. Supp. 445,446 n.3 (D. Minn. 1985) ("On a motion to dismiss, of course, the Court must accept plaintiff's allegations as true.")

Rule 56, Federal Rules of Civil Procedure.[4]

III. Discussion

The crux of the Plaintiff's Complaint rests upon his contention that he has been denied his constitutional right to be secure in his home as a result of a series of warrantless searches that were conducted by the Defendants. Since the Defendants were, at all times, acting under color of Federal law, the Plaintiff has alleged the making of a Bivens-type action. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,

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[4]Seeking to take advantage of the final sentence of Rule 12(b), Federal Rules of Civil Procedure, the Defendants have submitted materials outside the pleadings for the Court's consideration. The Plaintiff has responded in kind with his own documentary submissions. As the subsequent sections of this Opinion shall detail, the Court has concluded that it is without jurisdiction over the subject matter of the Plaintiff's Complaint and, therefore, the procedural and substantive prerequisites to the granting of Summary Judgment need not be further addressed.

403 U.S. 388 (1971) (violation of the Fourth Amendment's prohibition against unreasonable searches and seizures can give rise to an action for damages even in the absence of an express statutory authorization for the suit.)[5]

Even if no Bivens claim were presented, our examination of the Plaintiff's Complaint, with the indulgent construction that the law requires, counsels a determination of whether the Plaintiff's purported tort claims may properly be asserted under the Federal Tort Claim Act

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[5]If liberally construed, the Plaintiff's Complaint could be understood as asserting a claimed violation of his Fifth Amendment right to be free from the deprivation of his property rights without just compensation. However, this Court does not have jurisdiction to entertain a claim for damages, in excess of $10,000, which is based upon an unconstitutional taking without just compensation. Cf., Gun South, Inc. v. Brady, 877 F.2d 858 (11th Cir. 1989); Myers v. United States, 323 F.2d 580 (9th Cir. 1963). The Plaintiff has alleged

("FTCA"). Title 28 U.S.C. § 2671 et seq.

We examine each of these issues in turn.[6]

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damages of $30,000.

Moreover, even if the Plaintiff's claim, as so construed, were properly before this Court, the Plaintiff has not shown that he has suffered any damage. Rather, he points to his apprehension that his well may be contaminated, but his water supply has never been tested so as to determine if any contamination has occurred. As a consequence, any alleged interference with the Plaintiff's property, which purportedly resulted from a senseless act of vandalism has not been shown to be of such a character or of such substantiality as would warrant an award of just compensation. Richmond Elks Hall Assoc. v. Richmond Redevelopment Agency, 561 F.2d 1327 (9th Cir. 1977).

[6]We recognize that, logically, the issues should be addressed in reverse order for, if the Plaintiff has a right to recovery under the Federal Tort Claims Act ("FTCA"), then he would have no actionable Bivens claim. Cf., Schweiker v. Chilicky, 487 U.S. 412, 421-22 (1988) (Where Congress has provided an equally effective alternative remedy, resort to a Bivens action is unavailing); Bush v. Lucas, 462 U.S. 367 (1983). Nevertheless, since the Plaintiff has denied any interest in pursuing an FTCA claim, we address his Bivens action first as that is his primary claim for relief. Irrespective of a pro se litigant's rejection of an alternative claim

A. The Plaintiff's Claim for Constitutional Violations.

The essential elements of a Biven-type action, which the Plaintiff must successfully plead and prove, are:

> 1. that the Defendants performed acts or actions under color of federal law;
>
> 2. which resulted in the deprivation of a right, privilege or immunity guaranteed or preserved by the United States Constitution; and,
>
> 3. that produced damage to the Plaintiff.

See, Parratt v. Taylor, 451 U.S. 527, 535 (1981), o/ruled on o/grounds, Daniels v. Williams, 474 U.S. 327 (1986); Jenson v. Olson, 353 F.2d 825, 828 (8th Cir. 1965).

Notably, the Plaintiff's Complaint only asserts a claim against the Defendants in their individual capacities.[7]

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for relief, our obligation remains to evaluate each of that litigant's potential avenues of recovery.

[7]If the Plaintiff had asserted a Bivens claim against the Defendants in their official capacities, it would have been a suit against the offices that they have held and, as such, it would have been no different than a suit against the Federal government itself. See, Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989). As a general rule, therefore, a suit against a public officer in his official capacity is considered a suit against the government if the Judgment in the action would invade the public treasury, would interfere with the public administration, or would restrain the government from acting or would compel it to act. See, Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 101 n.11 (1984); see also, Kentucky v. Graham, 473 U.S. 159 (1985).

While there can be no doubt but that the Defendants were exercising their powers under the AWA and related Regulations, a suit against them in their official capacities would be barred. For, as we have noted, an action against Federal officers in the official capacity is treated as a suit against the United States. See, Kentucky v. Graham, supra. The United States enjoys immunity from civil suits, except where it has specifically waived that immunity. Congress has not consented to Bivens-type suits against the United States. See, Keene Corporation v. United States, 700 F.2d 836, 845 n. 13 (2d Cir 1983), cert. denied, 464 U.S. 864 (1983); Norton v. United States, 581 F.2d 390, 393 (4th Cir. 1978), cert. denied, 439 U.S. 1003 (1983); also cf., Laswell v. Brown, 683 F.2d 261 (8th Cir.

Our analysis turns to the elements of the Plaintiff's Bivens-type claim. Under the circumstances of this case, we need only address the second element of proof in his Bivens action, as the Defendants have conceded that their activities, of which the Plaintiff has complained, were performed under color of Federal Law and, in view of our determination that no constitutional violations have occurred, a discussion of the Plaintiff's claimed damages is unnecessary.[8]

1982), cert. denied, 459 U.S. 1210 (1982). Accordingly, even if the Plaintiff had alleged a Bivens action against the Defendants in their official capacities, the action would be barred as this Court would lack the subject matter jurisdiction to entertain the suit.

[8]We would note in passing that, at least ostensibly, the more pressing claim for damages is that which is related to the asserted contamination of the Plaintiff's water supply. Upon closer examination, however, those damages would appear to be conjectural at best. The Plaintiff never had his potable water supply examined for

1. Deprivation of a Constitutional Right.

There is, and can be, no dispute that the inspections in question did, in fact, occur and that they were searches within the meaning of the Fourth Amendment to the United States Constitution. See, Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (inspection of business premises implicates the Fourth Amendment).[9] Consequently, the

the presence of coliform bacteria, or for any other indicia of contamination, and his assertion of an injury relates solely to his anxiety of using his well water without purification. Of course, any anxiety of that sort could have been resolved through the performance of routine testing techniques. In the absence of any proof that his well water was contaminated -- and the passage of time has made such proof extremely problematic -- there can be no cognizable claim for damages in that respect.

[9]Although the evidence is not compelling, for our purposes we assume that the searches conducted by the Defendants invaded areas of the Plaintiff's property

issue before the Court resolves to whether a reasonable basis for the inspections existed, at the time that the inspections occurred, so as to satisfy the exacting requirements of the Fourth Amendment's guarantees.

The Fourth Amendment, with its proscription against unreasonable searches and seizures, is intended to protect the

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that he, subjectively, had an expectation would remain private. The protections afforded by the Fourth Amendment extend only to areas where there is a legitimate expectation of privacy, Katz v. United States, 389 U.S. 347 (1967), which includes houses, even if only occasionally occupied, cf., Robertson v. United States, 165 F.2d 752, 754-55 (6th Cir. 1948), and curtilage, which is the area of domestic use immediately surrounding a dwelling and usually fenced in with the dwelling. Marullo v. United States, 328 F.2d 361, 363 (5th Cir. 1964), cert. denied, 379 U.S. 850 (1964). A more fundamental approach to what is protected curtilage considers the proximity or the annexation of that area to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family. Care v.

sanctity of a person's home and the privacies of one's life from searches that are conducted under the aegis of an indiscriminate, general authority. See, Warden v. Hayden, 387 U.S. 294, 301 (1967). In this respect, the Amendment's purpose is to deter the undesirable and the unreasonable conduct of government officers. Id. Generally, the facts of each case will determine whether the conduct of government

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United States, 231 F.2d 22, 25 (10th Cir. 1956) (Mellot, J.) cert. denied, 351 U.S. 932; McDowell v. United States, 383 F.2d 599, 603 (8th Cir. 1967).

The Plaintiff admits that his house is 85 feet from the sheds in which the animals are kept and where the inspections occurred, but his averments are somewhat inconsistent as to whether the buildings had been used for the housing of pets or for animals which served as a adjunct to his staple foods. In any event, the areas searched on the Plaintiff's property appear to fall within the definition of curtilage, and are, therefore, reasonably expected to be private, although a persuasive argument to the contrary could well be made.

officers has been unreasonable. Ker v. California, 374 U.S. 23, 33 (1963). Warrantless searches are presumptively unreasonable, Katz v. United States, 389 U.S. 347, 357 (1967), even when applied to commercial premises, Camara v. Municipal Court, 387 U.S. 523, 543 (1967), and, normally, it is the burden of the government to demonstrate that a warrantless search is otherwise reasonable under the Fourth Amendment. United States v. Jeffers, 342 U.S. 48, 51 (1951).

The privacy interests which underlie the constitutional privilege to be free from unreasonable searches are, understandably, highly revered by this Plaintiff. He has assured the Court that the "Constitution of the United States of America * * * has been pinned to [his] wall for 20 years -- opened to Amendment Four." Likewise, the Plaintiff assures that the driveway to his home has

been blocked for the past 15 years with a placard which instructs: "ABSOLUTELY NO ADMITTANCE BEYOND THIS POINT." The Plaintiff's unwavering allegiance to the privacy of his household and his ardent insistence, premised upon his construction of the language of the Fourth Amendment, that the agents of the Federal Government must recognize and respect his right to untrammeled solitude, are beyond serious question.[10] We do not quarrel with the veneration that the Plaintiff holds for his Fourth Amendment rights, only with his inference that those rights extend, without so much as the slightest qualifications, to most any interest that the Plaintiff should choose to protect. Even in the most

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[10]While the Court respects the adamancy of the Plaintiff's insistence upon his constitutional rights, that adamancy is frequently vocalized in a derisory or contemptuous and, on occasion, in a

individualistically oriented of societies, on one occasion or another, individualists will have to interact, and therein lies the rub. Here, the interests of an individual have collided with society's interest in regulating the nurture and exhibition of animals. Which of these conflicting forces will prove to be the irresistible one is dependent upon historic doctrines of Constitutional Law.

Although prodigious in its protective breadth, the safeguards of the Fourth Amendment, including its insistence upon the

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needlessly vulgar way. For disagreeing with the Plaintiff on a myriad of subjects, including his interpretation of the Fourth Amendment, the Defendants have been castigated with language that is intemperate and demeaning, at best. With an indulgent eye, the Court has viewed these virulent expressions, as they have been exhaustively repeated in his written communications with APHIS, as a symbolic, if not hyperbolic, pronouncement of the Plaintiff's keen sense of individualism.

use of search warrants, are not without limits. Exceptions to the search warrant requirements of the Fourth Amendment have long been recognized. As but one example, warrants are not essential to the search of pervasively regulated businesses, or of closely regulated industries which have long been subjected to exacting supervision and inspection. Marshall v. Barlow's, Inc., supra at 313. The industries which have been included within this exception have had such a prolonged history of government oversight, or have been so impacted by licensing and regulatory requirements, that any person who should choose to enter such a business would be well aware of the regulatory restrictions and would, in effect, consent to the same.[11] Id. When a

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[11]Although the duration of the regulatory scheme is an important factor in determining whether a warrantless inspection

legislature "has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the * * * regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes" a warrant may be required by the Constitution. Donovan v. Dewey, 452 U.S. 594, 600 (1981) (warrantless inspection made pursuant to the Federal Mine Safety and Health Act); see also, United States v.

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is permissible, the Supreme Court has cautioned that absurd results would occur if the length of regulation were the only pertinent criterion. New York v. Burger, 482 U.S.691 n.12(1987), quoting Donovan v.Dewey,452 U.S.594,606 (1981). We regard both the length of time that the AWA has been in effect, and the carefully structured inspection program that has been created pursuant to its terms, to overcome any reluctance to treat the nurture and the exhibition of animals as a closely regulated industry. Cf., Cox v. United States Dept. of Agriculture, 925 F.2d 1102 (8th Cir.

Biswell, 406 U.S. 311 (1972) (warrantless inspection of premises of a pawn shop operator, who was federally licensed to sell sporting weapons under the Gun Control Act of 1968); Wyman v. James, 400 U.S. 309 (1971); New York v. Burger, 482 U.S. 691 (1987) (warrantless inspection of an automobile junkyard).

Where the privacy interests of the owner of a business are weakened and the governmental interests in regulating that particular business are, concomitantly, enhanced, a warrantless inspection of the owner's business premises may well be reasonable within the meaning of the Fourth Amendment. New York v. Burger, supra at 702. However, the warrantless inspection of

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1991), (the court of Appeals for the Eighth Circuit affirmed the imposition of a fine that was assessed when a licensee under the AWA refused an unannounced inspection by APHIS personnel).

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a pervasively regulated business will be deemed to be reasonably only so long as three criteria are satisfied. Id. First, there must be a "substantial" governmental interest that informs the regulatory scheme pursuant to which the inspection is made.[12] Second, the warrantless inspections must be necessary in order to further the regulatory scheme. Id. For example, where forcing inspectors to obtain a warrant before every inspection might alert the owners or the operators of the business to an impending inspection, thereby frustrating the purposes

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[12]See, Donovan v. Dewey, supra at 602, ("substantial federal interest in improving the health and safety conditions in the Nation's underground and surface mines"); United States v. Biswell, 406 U.S. 311, 315 (1972) (regulation of firearms is "of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders"); Colonnade Catering Corp. v. United States, 397 U.S. 72, 75 (1970) (Federal interest "in protecting the revenue against various types of fraud.

of the legislation which authorizes that inspection, warrantless searches may be necessary. Donovan v. Dewey, supra at 603. Finally, the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant. New York v. Burger, supra at 703. As stated in the Burger decision:

> In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. See Marshall v. Barlow's, Inc., 436 U.S., at 323; see also id., at 332 (Stevens, J., dissenting). To perform this first function, the statute must be "sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." Donovan v. Dewey, 452 U.S., at 600. In addition, in defining how a statute limits the discretion of the inspectors, we have observed that it must be "carefully limited in time, place and scope."

Id. at 703.

In applying these criteria to the circumstances before the Court, we conclude that the warrantless searches conducted by the Defendants were reasonable and not violative of the protections of the Fourth Amendment.

a. Substantial Governmental Interest.

The statutory scheme, under which the Defendants' authority to inspect arose, was promulgated by the AWA, Title 7 U.S.C. §2131, et seq., which was first enacted in 1966. Section 2131 expresses the Congressional policies which fostered the AWA, and which were intended, at least in part, "to insure that animals intended * * * for exhibition purposes or for use as pets are provided humane care and treatment." The Statement of Policy clearly reflects the substantial interest that Congress extended to the regulation of animals held for exhibition or for sale as pets, by expressly

characterizing such regulation as being "essential." Id. Although the existence of a substantial governmental interest, in regulating animals for exhibition or for sale as pets, has been established, there must also be a showing that such an interest will be furthered by a regulatory scheme which includes inspections. This, too, has clearly been demonstrated by the express terms of the AWA.

Title 7 U.S.C. §2146(a) provides in pertinent part:

> The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer [or] exhibitor * * * has violated or is violating any provision of this chapter or any regulation or standard thereunder * * *.

The Regulations which created the inspection regimen, that the Secretary of Agriculture has determined was essential to further the purposes of the AWA, are codified at 9

C.F.R. Chapter 1, Part 2, Subpart A. These Regulations verify that inspections of the facilities, which are intended for uses covered by the Act, are necessary to ascertain whether the applicant for a Federal license, and Federal licenses, are in compliance with the standards and regulations that have been promulgated under the Act. See, 9 C.F.R. §§2.3 and 2.126. Accordingly, inspections are critical to the continued enforcement of the AWA's regulatory scheme, and the first criterion of New York v. Burger is satisfied.

b. Warrantless Inspections Are Necessary to a Regulatory Purpose.

As with the Donovan case, warrantless inspections are undoubtedly necessary under the AWA. Any forewarning of an impending inspection would frustrate the purposes of the Act by allowing operators to remove animals evidencing signs of mistreatment or

to transiently correct and deficiencies in anticipation of a scheduled inspection, solely for the purposes of passing that inspection. Donovan v. Dewey, supra at 603; United States v. Biswell, supra at 316 ("[I]f inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential.") Given the statement of Congressional purpose, the prerequisite of a warrant could easily frustrate inspection and, therefore, the second criterion of New York v. Burger is fulfilled. Cox v. United States Dept. of Agriculture, 925 F.2d 1102, 1107 (8th Cir. 1991) ("Refusal to allow inspection is serious because it prevents detection of AWA violations."), cert. denied, 112 S.Ct. 178 (1991).

c. Certainty and Regularity of the Inspection Program.

As set out in New York v. Burger, the

regulatory scheme must advise the owner that any inspection that is to be undertaken will be accomplished according to the statutory standards and within a properly defined scope. In other words, the regulatory program must be sufficiently comprehensive and defined that the owner of the property cannot help but be aware that his property will be subject to periodic inspections which will be conducted for specific purposes. Moreover, the regulatory process must effectively constrain the discretion of the inspecting officers by delimiting the time, place and scope of the inspection. Id. at 702-03.

In this respect, the AWA explicitly authorizes administrative investigations and inspections. Title 7 U.S.C. §2146(a) provides, in relevant part:

> The Secretary shall make such investigations or inspections as he

> deems necessary to determine whether any dealer [or] exhibitor * * * has violated or is violating any provision of [the Act] or any regulation or standard issued [under it], and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept * * *."

In furtherance of these objectives, the Regulations promulgated by the Secretary under the AWA require that any person operating or desiring to operate as a dealer, as defined by the Act,[13] is

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[13]Title 7 U.S.C. §2132(f) provides, in part:

> "The term 'dealer' means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet * * *."

The Plaintiff's past licensure and his most recent license application reveal his intent to be a dealer or an exhibitor under the AWA. Accordingly, he was subject to the constraints of the regulatory program established by the AWA.

required to have a valid license, and that each dealer must comply with the Regulations set forth in Part 2 and the Standards set forth in Part 3 of Subchapter A. 9 C.F.R. §§ 2.1(a), 2.100(a). The same Regulations provide that each new applicant for a license, and each applicant for a renewal of a license, will receive and must acknowledge the receipt of a copy of the applicable Regulations, and must agree to comply with them. 9 C.F.R. §2.2.

The Regulations, as they existed at the time of the subject inspections, expressly provided as follows:

> Each applicant must demonstrate that his premises and any facilities or equipment used in his business comply with the standards set forth in Part 3 of this subchapter. Upon request by the Veterinarian in Charge, the applicant must make his premises, facilities, and equipment available at a time or times mutually agreeable to said applicant and Veterinary Services representative for the purposes of ascertaining compliance with said standards. If the applicant's

premises, facilities, or equipment do not meet the requirements of the standards, the applicant will be advised of existing deficiencies and the corrective measures that must be taken and completed to bring such premises, facilities, and equipment into compliance with the standards.

9 C.F.R. § 2.3.

Each dealer, exhibitor, operator of an auction sale, or research facility shall, during ordinary business hours, permit Veterinary Services representatives, or other Federal officers or employees designated by the Secretary, to enter his place of business to examine records required to be kept by the Act and the regulations in this part, and to make copies of such records, and permit Veterinary Services representatives to enter his place of business, to inspect such facilities, property and animals as such representatives consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter. The use of a room, table, or other facilities necessary for the proper examination of such records and inspection of such property or animals shall be extended to such authorized representatives of the Secretary by the dealer, exhibitor, operator of an auction sale, or research facility, his agents and employees.

9 C.F.R. §2.126.

As the foregoing provisions make clear, the regulatory scheme of the AWA is sufficiently comprehensive and defined that an applicant for a license, or for a renewal of a licensee, could not reasonably avoid being aware that specific segments of his property and of his business records would be open to periodic inspections in order to determine his compliance with the AWA. The time, place and the scope of the inspections are clearly defined, and the Regulations assure that those applying for a license, or for a license renewal, are aware of the potential inspections by acknowledging and agreeing to the regulatory provisions. 9 C.F.R. §2.2.[14] Therefore, the third criterion of New York v. Burger is met. See, e.g., Western States Cattle Co., Inc. v. Edwards, 895 F.2d 438, 442 and n. 4 (8th Cir. 1990)

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[14]Section 2.2 provided, at the time of the inspections that the Plaintiff contests,

(recognizing that notice of a search can be provided by receipt of the agency's regulations which advise of a susceptibility to unannounced searches).

The criteria for a reasonable, but warrantless administrative inspection having been satisfied, we conclude that the searches of the Plaintiff's premises, that had been conducted by the Defendants, were valid and did not violate[15] the Plaintiff's constitutional rights.[16]

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as follows:

> Acknowledgement of standards.
>
> A copy of the applicable standards will be supplied to the applicant with each request for an application for a license, and the applicant shall acknowledge receipt of such standards and agree to comply with them by signing the application form provided for such purpose by Veterinary Services.

[15]In view of our ruling that the Plaintiff's constitutional rights were not violated, we need not reach the issue of the Defendants' qualified immunity. We do note,

however, the substantial probability that the doctrine of qualified immunity would shield these Defendants from any liability arising from their inspections of the Plaintiff's animal business. Anderson v. Creighton, 483 U.S. 635 (1987); New York v. Burger, supra; Blair v. Freeman, 483 U.S. 1014 (1987; Blair v. Freeman, 862 F.2d 1330, 1331-32 (8th Cir. 1989) (applying the holdings in Anderson and Burger to a warrantless search conducted in 1982 under a regulatory scheme similar to that presented by the AWA in 1986).

[16]We reject the Plaintiff's argument that he was insulted from any APHIS inspection because his license application fee had been returned to him and, under his construction of the regulations, he was without a license. The provisions of 9 C.F.R. §2.5(b), upon which the Plaintiff relies, are not supportive of his argument. While the regulation may be read to reflect that an "automatic termination" of a license will befall the applicant who does not, within 60 days of receiving notice of his failure to pay the application fee, refuses to pay the fee, the Plaintiff never received such notice. In August of 1986, when the APHIS representatives returned his application fee, they also requested that he return his license. They did not terminate his license, nor did he return his license, because he wanted to retain USDA licensure. Although the APHIS personnel attempted to notify the Plaintiff that his license would terminate if he did not pay his application fee by December 15, 1986, that notice was posted on the door to his home as the Plaintiff's whereabouts could not be determined, other than to the extent of the

Miller's belief that he was in Ohio. No inspections occurred after December 15, 1986.

On this point, we find particularly instructive the Plaintiff's comments in his letter to Eppele of February 3, 1987:

> It should have been crystal clear to you that I have severed all connections with your agency when I did not send you the five dollar license fee after you returned my overpayment money order of ten dollars which you had held for months instead of depositing it as a reputable federal agency would have done. Since you did not have enough sense to realize that, this then is a formal notification: I have severed any and all association with your disgraceful agency, U.S.D.A.-A.P.H.I.S.-V.S. Void my license immediately.

In response, by letter dated February 10, 1987, the Plaintiff's license was terminated. By his own tacit admission, the Plaintiff had a valid USDA license at the time of the subject inspections, and the record before the Court is devoid of any showing that the APHIS personnel were aware of any intent, on the Plaintiff's part, to terminate his USDA license prior to their receipt of his letter of February 3.

We are mindful that the APHIS representatives ultimately concluded that the Plaintiff was not required to have a license as he had not been selling animals for some period of time. Nevertheless, it was

B. The Plaintiff's FTCA Claim.

The FTCA is a limited waiver of sovereign immunity, United States v. Orleans, 425 U.S. 807, 813 (1976), by which the United States has agreed to assume liability for tort claims in the same manner and to the same extent as a private individual would be liable under like circumstances. Within the confines of the FTCA, the existence of a legally recognizable tort is determined by application of the law of the State in which the tort is alleged to have occurred. Title 28 U.S.C. §2679(b)(2)(A).

Here, the Plaintiff has asserted that the Defendants are liable for damages, by reason of their violation of the Minnesota

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the Plaintiff who applied for licensure and it was he who, in his application of June 3, 1986, acknowledged receipt of and agreed to comply "with all the regulations and standards contained in 9 C.F.R. Chapter I, Subchapter A."

Statutes which relate to trespass, Minn. Stat. §609.60, to damage to property, Minn. Stat. §609.687, subd. 2(a), and to the infliction of emotional distress, as well as a claimed violation of Article I, Section 10, of the Minnesota Constitution. The statutes cited by the Plaintiff, however, are criminal statutes which do not create private causes of action. Cf., Jeffers v. Convoy Co., 636 F. Supp. 1337 (D. Minn. 1986); see also, H.J., Inc. v. Northwestern Bell Corp., 420 N.W.2d 673 (Minn. App. 1988). Nevertheless, trespass is a well-recognized common law tort, see, e.g., Martin v. Smith, 214 Minn. 9, 7 N.W.2d 481 (1942), and claims for damages, arising from the infliction of mental distress, are now actionable in Minnesota. See, e.g., Leaon v. Washington County, 397 N.W.2d 867 (Minn. 1986). The claimed damage to the Plaintiff's property could be asserted on

either negligence or trespass grounds, and the purported adulteration of documents would most closely be akin to fraud, while the Plaintiff's allegation that Minnesota's Constitution has been violated resembles a claim for an invasion of privacy. Under such an expansive view, the Plaintiff's claims assert tort causes of action which may be asserted under the FTCA. See, Title 28 U.S.C. §2671, et seq.

The Plaintiff does not assert jurisdiction based upon the FTCA and, during the Hearing on these Motions, he expressly denied that he was pursuing any remedy under the FTCA. Nevertheless, the FTCA is the exclusive remedy for tort claims against an employee of the United States Government for any acts or omissions of that employee which occurred during the course and scope of the employee's office or employment. Title 28 U.S.C. §2679(b)(1).

Section 2679(d)(2) provides the procedural mechanism by which the "scope of employment" determination is made:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such a claim * * * shall be deemed an action or proceeding brought against the United States under the provisions of this title * * * and the United States shall be substituted as a party defendant.

The United States Attorney for this District, as the disignee of the Attorney General, has certified that the Defendants' actions, here complained of, occurred while they were acting within the scope of their employment.[17] This certification is conclusive for removal purposes only, S J and W Ranch v. Lehtinen, 913 F.2d 1538 (11th

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[17]See Docket entry No. 16 in the Clerk's file.

Cir. 1990), opinion amended by 924 F.2d 1555 (11th Cir. 1991), cert. denied, 112 S.Ct. 62 (1991), and it is subject to de novo review by the District Court once removal from the State Court has been accomplished. Brown v. Armstrong, 949 F.2d 1007, 1011 (8th Cir. 1991); Meridian v. United States, 939 F.2d 740 (9th Cir. 1991); Hamrick v. Franklin, 931 F.2d 1209 (7th Cir. 1991), cert. denied, 112 S.Ct. 200 (1991); Nadler v. Mann, 731 F. Supp. 493 (S.D. Fla. 1990), aff'd. in part, rev'd in part, on o/grounds, 951 F.2d 301 (11th Cir. 1992).

Even through it is subject to de novo review, the certification by the United States Attorney constitutes prima facie evidence that the Defendants were acting within the scope of their employment, Brown v. Armstrong, supra, and the Plaintiff has the burden of presenting specific facts which demonstrate that the conduct of which

he complains occurred outside the scope of employment. See Nadler v. Mann, 951 F.2d 301, 304 n.5 (11th Cir. 1992); Hamrick v. Franklin, supra. In the present case, the Plaintiff has wholly failed to do so.

In his Supplemental Memorandum, which was submitted after the Hearing upon the Court's invitation, the Plaintiff has contended that sufficient facts have been presented to establish that the Defendants have falsified documents, and that such falsification is proof that the Defendants acted outside the scope of their employment. It is State law, however, which sets the boundaries for the "scope of employment" determination, cf., Brown v. Armstrong, supra at 1012, and in Minnesota, liability for acts committed by employees within the scope of their employment extends to willful, wanton, malicious or fraudulent acts, as well as to those which are the

product of negligence. See, e.g., Semrad v. Edina Realty, Inc., 470 N.W.2d 135, 143 (Minn. App. 1991), aff'd. in part, rev'd. in part, on o/grounds, --- N.W.2d ---, 1992 WL 354, 942 (Minn. December 4, 1992); Opatz v. John G. Kinnard and Co., Inc., 454 N.W. 471, 473-74 (Minn. App. 1990); Marston v. Minneapolis Clinic of Psychiatry and Neurology, Ltd., 329 N.W.2d 306, 309-11 (Minn. 1983); Lange v. National Biscuit Co., 297 Minn. 399, 403-04, 211 N.W.2d 783, 785 (1973); Manion v. Jewel Tea Co., 135 Minn. 250, 160 N.W. 767 (1916). Roemer v. Jacob Schmidt Brewing Co., 132 Minn. 399, 157 N.W. 640 (1916). Consequently, the Plaintiff's conclusory allegations of bad faith and fraud are insufficient to take the Defendants' actions outside the scope of their employment. See, Brown v. Armstrong, supra at 1011; Nelson v. Nelson, 282 Minn. 487, 166 N.W.2d 70 (1969) (substantial

deviation from employer's business required).

The Plaintiff has also asserted that the alleged urination near his well was an act performed outside the scope of Maas' employment, but such an assertion also fails to meet the applicable test. An employee's deviations from the employer's business, which are only slight or incidental, see, Nelson v. Nelson, supra, or which were taken for the employee's personal comfort, will not remove those activities from the scope of employment. Edgewater Motels, Inc. v. Gatzke, 277 N.W.2d 11 (1979); Reliance Ins. Co. v. Stack, 289 N.W.2d 71 (1979). We hasten to add that we do not condone the conduct complained of, if it did occur; we only note that, under the laws of the State of Minnesota, such conduct is not outside the scope of employment, absent other factors which have not been demonstrated to

have occurred here. Thus, the United States is the proper Defendant with respect to the Plaintiff's tort claims, and the exclusive remedy for asserting those claims is under the FTCA.

Even if the FTCA claim had been properly paid, we believe nonetheless, that the claim would be absolutely barred. Title 28 U.S.C. § 2679(d)(4) provides as follows:

> Upon certification, any action or proceeding subject to paragraph (1), (2) or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the same limitations and exceptions applicable to those actions.

One of the referenced limitations is contained in Title 28 U.S.C. §2675(a), which requires, as a jurisdictional prerequisite, that any claim brought under the FTCA first be presented to the appropriate federal agency and be finally denied by that agency.

It is undisputed that the Plaintiff has failed to present his tort claims to the USDA and, even if the Court were to presume that the Plaintiff's letter of February 3, 1987, was intended to be a notice to the USDA of a tort claim, the letter would be patently insufficient. Nowhere in the letter does the Plaintiff assert a claim against the United States Government, nor does the letter request any monetary damages. See, Title 28 U.S.C. §2675(a); Montoya v. United States, 841 F.2d 102 (5th Cir. 1988). Since more than two years have elapsed since the Plaintiff's tort causes of action accrued, his opportunity to present his claims to the USDA is time barred. Title 28 U.S.C. §2401(b). The Plaintiff's failure to assert his tort claims within the two-year statutory period mandates a finding that the Plaintiff has failed to exhaust his administrative remedies. Therefore, this

Court lacks subject matter jurisdiction over the Plaintiff's tort claims, see, Title 28 U.S.C. §2675(a), and the Defendants are entitled to Judgment as a matter of law on those claims.

The Court having no jurisdiction over the Plaintiff's claims whether they arise under either the Bivens doctrine or the FTCA, the Complaint of the Plaintiff should be dismissed for want of subject matter jurisdiction. Rule 12(b)(1), Federal Rules of Civil Procedure.

WHEREFORE, it is --

RECOMMENDED:

That the Court enter an Order GRANTING the Defendants' Motion to Dismiss [Docket Entry Nos. 8 and 13], and DISMISSING the Plaintiff's Complaint for want of subject matter jurisdiction.

Raymond L. Erickson
UNITED STATES MAGISTRATE JUDGE

NOTICE

Pursuant to Rule 6(a), Federal Rules of Civil Procedure, D. Minn. LR1.1(f), and D. Minn LR72.1(c)(2), any party may object to this Report and Recommendation by filing with the Clerk of Court, and by serving upon all parties **by no later than January 20, 1993,** a writing which specifically identifies those portions of the Report to which objections are made and the bases of those objections. Failure to comply with this procedure shall operate as a forfeiture of the objecting party's right to seek review in the Court of Appeals.

If the consideration of the objections requires a review of a transcript of a

Hearing, then the party making the objections shall timely order and file a complete transcript of that Hearing by no later than January 20, 1993, unless all interested parties stipulate that the District Court is not required by Title 28 U.S.C. §636 to review the transcript in order to resolve all of the objections made.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Kenneth S. Benigni,

Plaintiff,

v.

Civil No. 5-91-183

Donald W. Maas, John F. Kirchberg, Dennis Munson, and P.M. Eppele,

ORDER

Defendants.

Benigni moves the Court, under Fed. R. Civ. P. 52(b) and 59(a) & (e), to vacate or amend the Court's Order of February 22, 1993 dismissing Benigni's Complaint. Benigni bases his request on arguments previously rejected by the Court, on regulations no in effect at the time of the relevant events, and on his affidavit containing a hearsay restatement of a conversation he had with a former U.S.D.A. employee. The Court will not reconsider arguments it has already

rejected and the regulations Benigni cites are irrelevant. As to the "newly discovered evidence" in the affidavit, it consists mostly of hearsay legal conclusions. Moreover, Benigni does not explain why he could not have obtained this "evidence" earlier.

Accordingly, **IT IS HEREBY ORDERED THAT** Benigni's motion to vacate or amend the February 22, 1993 Order is **DENIED.**

Dated: March 28, 1993.

RICHARD H. KYLE, Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2134MND

Kenneth S. Benigni,	*	Order Denying
	*	Petition for
Appellant,	*	Rehearing and
	*	Suggestion for
vs.	*	Rehearing
	*	En Banc
Donald W. Maas; et al.,	*	
	*	
Appellees.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

January 21, 1994

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit